88-1291

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

WILLIAM F. GREGORY, MICHAEL C. SULLIVAN
and SULLIVAN-GREGORY, INC.,
a Michigan corporation,

Petitioners,

-vs-

POPEYES FAMOUS FRIED CHICKEN & BISCUITS, INC.,
a Louisiana corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

– AND APPENDICES –

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QUESTIONS PRESENTED

I.

Whether Petitioners, Citizens of and Governed by the Laws of the State of Michigan, Have Been Denied Due Process of Law Where, in a Diversity Case Tried by the United States District Court in the State of Michigan, the District Court Imposed a Remedy on Petitioners, Which is Contrary to the Laws and is Not Available in the Courts of the State of Michigan?

II.

Whether The Mandate of *Erie* was Violated Where, in a Diversity Case, the District Court Imposed on Petitioners a Harsh Remedy, Which is Contrary to the Laws and is Not Available in the Courts of the State of Michigan and Where the Court of Appeals Affirmed the District Court, by Misstating the Record and by Erroneously Fabricating an Unknown and Unrecognized Category of Contract?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the United States District Court were:

i) William F. Gregory, Michael C. Sullivan and Sullivan-Gregory, Inc., residents of the State of Michigan, Petitioners herein;

ii) Popeyes Famous Fried Chicken & Biscuits, Inc., a resident of the State of Louisiana, Respondent herein.

DESIGNATION OF CORPORATE RELATIONSHIPS

The Sullivan-Gregory, Inc. corporation, filing this Petition for Writ of Certiorari as a Petitioner in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Sullivan-Gregory, Inc. is not a subsidiary or an affiliate of a publicly-owned corporation.

There is not a publicly-owned corporation not a party to the appeal that has a financial interest in the outcome.

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DATED: January 30, 1989

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The transcript of the hearing in the United States District Court for the Eastern District of Michigan on Respondent's motion for summary judgment is included in App. A, *infra*, pp. A-1 to A-15. This transcript includes argument of counsel and conclusions of law of the district court. The district court made no findings of fact and issued no separate opinion. The Judgment of the district court (App. B, *infra*, pp. B-1 to B-2) is unreported.

The *per curiam* Opinion of the United States Court of Appeals for the Sixth Circuit (App. C, *infra*, pp. C-1 to C-9) is unreported. The Order of the Court of Appeals

denying rehearing (App. D, *infra*, p. D-1) is unreported. The Order of the Court of Appeals, denying the petition for rehearing en banc (App. E, *infra*, p. E-1) is unreported. The Order of the Court of Appeals granting the motion to stay mandate (App. F, *infra*, p. F-1) is unreported.

JURISDICTION

The *per curiam* Opinion of the United States Court of Appeals for the Sixth Circuit was entered on September 9, 1988. The Order of the Court of Appeals denying the petition for rehearing was entered on November 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The applicable provision of the United States Constitution, fifth amendment, is:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . "

STATEMENT OF THE CASE

1.

BACKGROUND

Sullivan-Gregory, Inc. is a Michigan corporation, which was formed for the purpose of owning and operating franchise stores selling Popeyes Famous Fried Chicken and Biscuits at certain locations in Oakland County, Michigan. Michael C. Sullivan, a resident of the State of Michigan is an individual shareholder of Sullivan-Gregory, Inc. William F. Gregory is also a resident of the State of Michigan and an individual shareholder of Sullivan-Gregory, Inc. (Sullivan-Gregory, Inc., Michael C. Sullivan and William F. Gregory will hereinafter be referred to collectively as "Petitioners").

Popeyes Famous Fried Chicken & Biscuits, Inc. is a Louisiana corporation, and the franchisor of the "Popeyes Famous Fried Chicken System", with 670 stores located throughout the United States (Popeyes Famous Fried Chicken & Biscuits, Inc. will hereinafter be referred to as "Respondent").

During the period 1979 to 1983, Petitioners entered into six franchise agreements with Respondent and opened six franchise stores. The material provisions of the six franchise agreements were identical.

On March 28, 1985, pursuant to 28 U.S.C. § 1332, Petitioners commenced a lawsuit against Respondent in the United States District Court for the Eastern District of Michigan. Petitioners' claim against Respondent concerned the obligation of Respondent to provide advertising under the franchise agreements. Jurisdiction in the district court was based on diversity of citizenship.

On May 22, 1985, Respondent filed a counterclaim against Petitioners demanding damages for breach of the franchise agreements. Respondent claimed that Petitioners failed to pay certain royalty and advertising fees.

2.

COURSE OF PROCEEDINGS IN THE DISTRICT COURT

A. Petitioners' Claim

Trial before the district court took place on the mornings of March 26, 27 and 30, 1987. During the trial, Petitioners claimed that Respondent breached the franchise agreements by failing to provide advertising.

Respondent denied that it had a duty to provide advertising under the franchise agreements. William

Copeland, Respondent's Executive Vice President, testified: ". . . if money was paid [by Petitioners], we would provide advertising for them".

At the close of Petitioners' proofs, Respondent made an oral motion to dismiss Petitioners' claim. The district court ruled that under the franchise agreements Respondent had no duty to provide advertising for the benefit of Petitioners. The Court granted Respondent's motion and dismissed Petitioners' claim.

This petition for writ of certiorari is not concerned with the district court's dismissal of Petitioners' claim.

B. Respondent's Counterclaim

The following day, on March 31, 1987, the parties returned for trial on Respondent's counterclaim. Respondent then made an oral motion for summary judgment. The hearing on the motion lasted some fifty-five minutes. (The transcript of the hearing is included in App. A, *infra*, pp. A-1 to A-15.) In its motion, Respondent demanded judgment against Petitioners in the full contractual amount under the franchise agreements, namely, three percent of gross sales for advertising and five percent of gross sales for royalties.

Petitioners opposed Respondent's motion for summary judgment, on the ground that Respondent had "not sustained any damage". Petitioners' argument was based on the district court's prior ruling that Respondent had no duty to provide advertising for the benefit of Petitioners and on Respondent's admission that it did not provide advertising unless and until the fees for advertising were paid.

The district court made no findings of fact. More particularly, the court neither made a finding of performance on the part of Respondent nor a finding of the

amount of damages sustained by Respondent. In addition, the court did not construe the contract (App. A, *infra*, pp. A-1 to A-15).

The court did, however, grant summary judgment in favor of Respondent for the total contract price under the franchise agreements.

On April 3, 1987, the court entered judgment against Petitioners William F. Gregory, Michael C. Sullivan and Sullivan-Gregory, Inc., jointly and severally, in the amount of Nine Hundred Twenty Six Thousand Four Hundred Twenty and 79/100 ($926,420.79) Dollars (App. B, *infra*, pp. B-1 to B-2).

On May 4, 1987, pursuant to 29 U.S.C. § 1291, Petitioners duly filed their appeal with the United States Court of Appeals for the Sixth Circuit from the judgment entered by the district court.

3.

PROCEEDINGS IN THE COURT OF APPEALS

Petitioners' principal argument on appeal was that the law of the forum, namely, the law of the State of Michigan, governs the remedy for breach of the franchise agreements.

Petitioners are all residents of the State of Michigan. Suit was brought in the United States District Court for the Eastern District of Michigan. Jurisdiction was based on diversity of citizenship. It is the well-settled law of the State of Michigan that a party to an executory contract is liable only for damages resulting from breach of the contract and not for the total contract price. In addition, the party seeking damages has the burden of proving its damages.

In their respective appellate briefs, neither Petitioners nor Respondent disputed the fact that the franchise agreements were executory on the part of both parties. On the one hand, Petitioners had not performed because they had not paid certain fees. On the other hand, Respondent had not performed because it provided advertising only after the fees were paid by Petitioners.

In its *per curiam* Opinion, the Court of Appeals acknowledged that "[u]nder Michigan law, a party to an executory contract is liable only for actual damages resulting from a breach, and not necessarily for the full contract price". (App. C, *infra*, p. C-6).

Nevertheless, the Court of Appeals affirmed the judgment of the district court in favor of Respondent for the full contract price. (App. C, *infra*, p. C-9.) The Court of Appeals did so by ruling:

> "We believe there was no error demonstrated in the district court's construing the contract to be *indivisible* and *nonexecutory in its nature.*" (App. C, *infra*, p. C-6.) (Emphasis added)

The Court of Appeals' ruling misstates the record. The district court record on Respondent's oral motion for summary judgment clearly indicates that the district court did not construe the contract. On the contrary, the district court granted summary judgment for the full contract price merely on the basis that the contract called for payment of certain fees. (App. A, *infra*, pp. A-1 to A-15.)

On September 21, 1988, Petitioners duly filed a petition for rehearing and, thereafter, a supplement thereto including suggestion for rehearing en banc. Petitioners' petitions were denied on November 4, 1988 and Nov-

ember 9, 1988, respectively. (App. D, *infra*, p. D-1 and App. E, *infra*, p. E-1.)

On November 11, 1988, Petitioners filed a motion to stay the issuance of the mandate pending application for writ of certiorari. By an Order dated November 29, 1988, the Court of Appeals granted Petitioners' motion to stay the issuance of the mandate for a period of sixty days. (App. F, *infra*, p. F-1.)

Now, Petitioners file this Petition for Writ of Certiorari to this Court. This Petition is concerned only with the counterclaim of Respondent and not with the claim of Petitioners.

REASONS FOR GRANTING THE WRIT

The facts of the instant case are essentially not in dispute. Respondent filed a counterclaim against Petitioners based on breach of certain franchise agreements in the United States District Court in Michigan. Jurisdiction was based on diversity of citizenship.

Respondent is a resident of Louisiana. Petitioners are residents of Michigan. As residents and citizens of the State of Michigan, Petitioners have the right to be governed by the laws of the State of Michigan.

In determining the appropriate remedy for breach of contract, Michigan law recognizes contracts which are "executed" and, alternatively, contracts which are "executory". There is no case in Michigan which has defined or recognized a contract which is "non-executory in its nature". Under well-settled Michigan law, once it is determined that a contract is executory, the appropriate remedy for breach is actual, proven damages and not the full contract price. In addition, it

is the burden of the party seeking a remedy for breach to prove any damages arising from the breach.

In Michigan, it is a rule of law, which has been unequivocally and definitively stated by the Michigan Supreme Court, that where there is breach of an executory contract the only remedy available is the actual proven damages and not the contract price. In 1929, in a leading case, *School of Commerce* v. *Stroud*, 248 Mich. 85 (1929), the Supreme Court of Michigan declared the law of Michigan to be:

> "'It is the rule in this State that a party to an executory contract may always stop performance by the other party by an explicit direction or renunciation of the contract, and refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract.'" *Id* at 88.

The Court concluded:

> "Plaintiff having no right to maintain any other action against defendant than for breach of contract, and having adduced no proof of any damage resulting from such breach, none may be awarded." *Id* at 90.

Two years later, the Michigan Supreme Court decided a second leading case, *Mt. Ida School for Girls* v. *Rood*, 253 Mich. 482 (1931). Again, the Court declared:

> ". . . in Michigan it is a rule of law, and we think a rule of procedure or remedy, that a party to an executory contract may always stop performance by the other party and refuse further to perform on his part, and after his refusal, he is 'liable only upon the breach of the contract'; and fur-

> ther, quoting from cases cited, it is said: 'The contract price is recoverable only upon the theory of performance, never upon the theory of inability to perform.'" *Id* at 486.

The Supreme Court rejected the plaintiff's claim of recovery based upon "defendant's independent promise to pay the contract price, regardless of nonperformance by plaintiff". *Id* at 485.

> "This question was squarely ruled upon in *International Text-book Co.* v. *Jones*, 166 Mich. 86; and the plaintiff's claim of right to recovery on the theory of an independent promise was rejected." *Id* at 488.

The Court ruled that, ". . . the established rule of law in Michigan is otherwise," and that,

> "The burden is upon plaintiff not only to establish a right to recover but likewise to establish the extent of recovery." *Id* at 489.

In its conclusion, the Court affirmed *Stroud, supra*, and affirmed judgment for the defendant. *Id* at 490.

The salient undisputed fact in the instant case is that a material provision of the franchise agreements, namely, the advertising provision, had not been performed either by Petitioners or by Respondent. Petitioners had not paid the advertising fees. Conversely, Respondent had not provided advertising services, where and because it had not received the advertising fees.

Nevertheless, the district court granted summary judgment for the full amount of the contract. The court made no findings, either as to whether the contracts were executed or executory or whether the contracts had been performed. The court summarily entered a

judgment based on the total contract price in the amount of $926,420.79. Such granting of summary judgment and entry of judgment based thereon were clearly contrary to and not available as a remedy under Michigan law.

On review, the Court of Appeals fabricated a new category of contract. Theretofore, under Michigan law, a contract was either executed or executory. However, the Court of Appeals ruled that a contract may be ". . . nonexecutory in its nature". This new category is not recognized either in Michigan law or in federal law.

In 1877, this Court itself declared that contracts are either "executed" or "executory", and contrasted "executed" and "executory" contracts in the following terms:

> "Contracts are executed or executory. A contract is executed where everything that was to be done is done, and nothing remains to be done." *Farrington* v. *State of Tennessee*, 95 U.S. 558, 559 (1877).

In contrast,

> "An executory contract is one where it is stipulated by the agreement of minds, upon a sufficient consideration, that something is to be done or not to be done by one or both the parties." *Ibid.*

The Court of Appeals' ruling in the instant case that the contract was ". . . nonexecutory in its nature" is meaningless and self-contradictory. A contract is either executory or executed in fact, depending upon the fact of performance by the parties. *Farrington* v. *State of Tennessee, supra.*

In addition, it is a clear misstatement of the record to rule that the district court construed the contract "to be indivisible and nonexecutory in its nature". (App. C, *infra*, p. C-6.)

A reading of the entire proceeding before the district court on Respondent's motion for summary judgment shows unequivocally that the district court neither made findings of fact nor did it construe the contract. (App. A, *infra*, pp. A-1 to A-15.)

By affirming the judgment of the district court, by inventing a new category of contract and by misstating the record, the Court of Appeals affirmed a remedy against Petitioners which is not available in the courts of the State of Michigan and is contrary to the laws of the State of Michigan. In effect, the Court of Appeals' ruling denies Petitioners due process of law.

Respondent has been granted a remedy against residents and citizens of the State of Michigan in a federal court which clearly would be unavailable in a Michigan court.

Furthermore, the courts below clearly violated the mandate of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Both the district court and the Court of Appeals failed, refused, avoided and did not follow the clear and unequivocal law of the forum, namely, the law of the State of Michigan. Review by this Court is necessary to protect Petitioners' constitutional right to due process, to uphold *Erie* and to prevent a gross injustice.

Finally, review by this Court is necessary to correct a situation which will severely impair the ability of the State of Michigan, and perhaps other states, to regulate the business of franchising. Franchising is a rapidly expanding form of business activity, involving thousands of franchisees. Franchises and the respective

rights, duties and obligations of franchisees and franchisors raise questions of exceptional and fundamental importance for the courts, for the parties and for the public.

For these reasons, in 1974, the State of Michigan enacted the Michigan Franchise Investment Law. M.C.L. § 455.1501 *et seq*. The declared purpose of the act is,

> "... to regulate the offer, sale, and purchase of franchises, to prohibit fraudulent practices in relation thereto; ..."

Furthermore,

> "This act shall be broadly construed to effectuate its purpose of protection to the public." Michigan Franchise Investment Law, preamble and § 455.1501.

In 1984, in order to regulate further the business of franchising, the State of Michigan enacted an amendment to the Michigan Franchise Investment Law. This amendment states that a provision in a franchise agreement which requires that litigation be conducted outside the State of Michigan is void and unenforceable.

> "Each of the following provisions is void and unenforceable if contained in any documents relating to a franchise.
>
> * * *
>
> (f) A provision requiring that arbitration or litigation be conducted outside this state." Michigan Franchise Investment Law, M.C.L. § 455.1527.

If a federal court sitting in the State of Michigan refuses to follow the law of the State of Michigan in a

diversity case, how then can the Legislature of the State of Michigan protect its citizens and residents and regulate the business of franchising?

I.

PETITIONERS, CITIZENS OF AND GOVERNED BY THE LAWS OF THE STATE OF MICHIGAN, HAVE BEEN DENIED DUE PROCESS OF LAW WHERE, IN A DIVERSITY CASE TRIED BY THE UNITED STATES DISTRICT COURT IN THE STATE OF MICHIGAN, THE DISTRICT COURT IMPOSED A REMEDY ON PETITIONERS, WHICH IS CONTRARY TO THE LAWS AND IS NOT AVAILABLE IN THE COURTS OF THE STATE OF MICHIGAN.

The due process clause of the fifth amendment to the United States Constitution states in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."

The due process clause encompasses the constitutional guarantee of equal protection of the laws and forbids discrimination by the federal government, where the discrimination is:

> "'. . . so unjustifiable as to be violative of due process.'" *Schneider* v. *Rush*, 377 U.S. 163, 168 (1964); *Boling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

In the instant diversity case, Petitioners have been denied their constitutional guarantee of due process of law for the following reasons:

1) That they have been subjected to invidious and unreasonable discrimination because the harsh remedy imposed by the United States District Court could not have been granted by the state courts of Michigan;

2) that the discrimination by the District Court was sanctioned by the Court of Appeals by a misstatement of the record; and

3) that the discrimination by the District Court was sanctioned by the Court of Appeals by the fabrication of a category of contract which is unknown and unrecognized in the laws of the State of Michigan.

In the instant case, the district court entered judgment in favor of Respondent against Petitioners. That judgment awarded damages measured by the total contract price. That judgment could not have been granted by the courts of the State of Michigan. Consequently, Petitioners have been deprived of their property without due process of law because of the fortuitious circumstance that the instant diversity case was tried in a federal court.

The issue to be determined is whether the actions of the district court and the Court of Appeals in the instant case are "so unjustifiable as to be violative of due process." *Schneider, supra,* 377 U.S. at 168. In order to determine this issue, the law governing the proper remedy for breach of an executory contract, as declared by the Michigan Supreme Court, must be examined.

The law governing the proper remedy for breach of an executory contract has been declared by the Michigan Supreme Court in two leading cases. The first leading case is *School of Commerce* v. *Stroud,* 248 Mich. 85 (1929). There, the defendant entered into a contract, in which he subscribed to three courses of instruction. The defendant then breached the contract, "by his own refusal to perform." The plaintiff stopped performance and sued the defendant. *Id* at 86.

The trial court entered judgment for the defendant. On appeal, the Michigan Supreme Court affirmed:

> "Plaintiff contracted with defendant with full knowledge of defendant's rights, which it must be presumed to know. It knew defendant had a right to renounce the contract and refuse to perform further, and that he thereafter was liable only for damages for breach of contract. Plaintiff made no proof of any damages arising from breach of contract." *Id* at 88.

Thus, the defendant was liable only for "damages for breach of contract," not for the contract price. The plaintiff failed to prove "any damages" and, consequently, judgment was properly entered for the defendant.

The Michigan Supreme Court went on to say:

> "By comity, citizens of Illinois may sue in the courts of Michigan, but the law of Illinois has no extraterritorial force. The courts of this State may not be used to prosecute to effect a cause of action in a manner contrary to the laws of Michigan. A foreign citizen cannot avail himself in the courts of this State of remedies which are denied to our own citizens." *Id* at 89.

The Supreme Court stated the law of Michigan to be:

> "'It is the rule in this State that a party to an executory contract may always stop performance by the other party by an explicit direction or renunciation of the contract, and refusal to perform further on his part, and that he is thereafter liable only upon the breach of the contract.

> 'The contract price is recoverable only upon the theory of performance, never upon the theory of inability to perform.'" *Id* at 88.

The Court concluded:

> "Plaintiff having no right to maintain any other action against defendant than for breach of contract, and having adduced no proof of any damage resulting from such breach, none may be awarded." *Id* at 90.

Two years later, the Michigan Supreme Court decided the second leading case, *Mt. Ida School for Girls* v. *Rood*, 253 Mich. 482 (1931). There, the defendant entered into a contract with the plaintiff in which it was agreed that the defendant's daughter would attend the plaintiff's school. The contract price was $1,200 for the school year; the defendant paid $550; the remaining balance was $650. The defendant's daughter attended only until Christmas; she did not return for the remaining portion of the school year. The plaintiff brought suit in Michigan, claiming the remaining balance of $650. During the trial, the plaintiff "planted its right to recover solely upon defendant's contract to pay". *Id* at 484 (emphasis added).

The trial court entered judgment in favor of the defendant, for the reason that the plaintiff had offered no proof of damages resulting from the breach of contract. On appeal, the Michigan Supreme Court affirmed. Following *Stroud, supra*, the Court declared:

> ". . . in Michigan it is a rule of law, and we think a rule of procedure or remedy, that *a party* to an executory contract may always stop performance by the other party and *refuse further to perform on his part*, and after his refusal, he is *'liable only upon the breach of the contract'*; and fur-

> ther, quoting from cases cited, it is said: '*The contract price is recoverable only upon the theory of performance, never upon the theory of inability to perform.*'" *Id* at 486 (Emphasis added).

The Michigan Supreme Court spoke in unequivocal terms:

> "What remedy do the courts of Michigan provide for such cases? Plaintiff is here asserting its right to a remedy by means of which it can recover the full contract price. The courts of Michigan do not provide such a remedy."
>
> ". . . Since the law of this State has fixed the remedy provided in such cases, plaintiff must be content with such remedy if it elects to prosecute its claim in the courts of this jurisdiction; and the rule is not affected by the fact, if it is a fact, that the parties contemplated performance of their executory contract in Massachusetts." *Id* at 487, 488.

Thus, the law of the State of Michigan, which determines the remedy for breach of an executory contract, is clear and unequivocal. Applying this law to the instant case, the bottom line then is whether there is a rational basis or justification for the decision by the district court to award Respondent damages in the full contractual amount, rather than actual proven damages, for breach of an executory contract.

The facts in the instant case are not in genuine dispute. The parties agree that Respondent did not provide advertising services, unless and until Petitioners paid "money in". That Petitioners had not paid the "money in" was the reason for Respondent's counterclaim. The contract was clearly executory on the part of both Petitioners and Respondent. Given these undisputed facts,

there was no rational basis or justification for the decision by the district court to award Respondent damages in the full contractual amount, rather than actual proven damages, for breach of an executory contract.

On appeal, the Court of Appeals affirmed the decision by the district court by stating:

> "We believe there was no error demonstrated in the district court's construing the contract to be indivisible and nonexecutory in its nature." (App. C, *infra*, p. C-6).

However, reading the entire transcript of the argument on Respondent's oral motion for summary judgment (App. A, *infra*, pp. A-1 to A-15) shows that there was no instance when the district court construed the contract.

Surely, if due process is to have any meaning, it embraces the fundamental principle of fairness. For the Court of Appeals to affirm the unfair and discriminatory decision by the district court and to assert that the district court had construed the contract when such statement is without any basis in fact, and is in fact a misstatement of the record, is a violation of due process.

Furthermore, not only did the district court fail to construe the contract, there is no mention in the district court record that the contract was "nonexecutory in its nature". The very concept of a contract being "nonexecutory in its nature" is a total fabrication by the Court of Appeals.

No law or authority is cited by the Court of Appeals to support its assertion that the contract was "nonexecutory in its nature". The question, whether a contract is executory or executed, cannot be answered

merely by construing the written agreement. A contract is not "nonexecutory in its nature". On the contrary, a contract is executory or executed in fact, based on the fact of performance by the parties.

In sum, the category of a contract which is "nonexecutory in its nature" is a fabrication by the Court of Appeals, without basis in law, and is meaningless, self-contradictory nonsense.

There is no rational basis or justification for the district court's awarding a harsh remedy in favor of Respondent, in a diversity case, which is contrary to the laws and is not available in the courts of the State of Michigan. The action of the district court, imposing a judgment on Petitioners for the full contract price, rather than the actual, proven damages, was without any rational basis ". . . and was so unjustifiable as to be violative of due process." In the instant case, Petitioners have been deprived of their property without due process of law.

Likewise, there was no rational basis or justification for the assertion by the Court of Appeals that the district court had construed the contract.

Finally, there was no rational basis or justification for the determination by the Court of Appeals that the contract was "nonexecutory in nature".

II.

THE MANDATE OF *ERIE* WAS VIOLATED WHERE, IN A DIVERSITY CASE, THE DISTRICT COURT IMPOSED ON PETITIONERS A HARSH REMEDY, WHICH IS CONTRARY TO THE LAWS AND IS NOT AVAILABLE IN THE COURTS OF THE STATE OF MICHIGAN AND WHERE THE COURT OF APPEALS AFFIRMED THE DISTRICT COURT, BY MISSTATING THE RECORD AND BY ERRONEOUSLY FABRICATING AN UNKNOWN AND UNRECOGNIZED CATEGORY OF CONTRACT.

In 1938, in its landmark decision, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), the Supreme Court of the United States declared:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

During the past fifty years, *Erie* has become the established law of the land. Thus, the *Erie* doctrine requires that in a diversity case, the federal court must follow and apply the law of the state where the federal court sits.

The explicit purpose of the *Erie* doctrine is to prevent the accident of diversity of citizenship from undermining the equal administration of justice in coordinate state and federal courts sitting side by side. *Erie*, *supra*, 304 U.S. at 74-77.

Following *Erie*, this Court decided *Klaxon Company* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 496 (1941). There, this Court held:

> "The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts."

Thirty-five years later, this Court reiterated:

> "A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3, 4 (1975).

How then, in the instant case, did the Sixth Circuit Court of Appeals affirm the obvious departure by the district court from the law of the State of Michigan, as stated by the Michigan Supreme Court?

The Court of Appeals did so by asserting that the district court had construed "the contract to be indivisible and nonexecutory in its nature". (App. C, *infra*, p. C-6.)

This assertion misstates the record and is erroneous. A reading of the entire transcript of the hearing in the district court will confirm that neither the parties, nor the district court made such a statement or arrived at such a conclusion.

The concept of a contract being "nonexecutory in its nature" was fabricated in total in the Court of Appeals.

More than 100 years ago, this Court declared that a contract is either executed or executory. On the one hand, a contract is executed when "nothing remains to be done"; and on the other hand, a contract is executory when "something is to be done". *Farrington* v. *State of Tennessee*, 95 U.S. 558, 559 (1877). The ques-

tion of whether a particular contract is executed or executory is inherently, therefore, a factual one.

In the instant case, it was the plain unambiguous testimony of Respondent that it did not provide advertising services under the franchise agreements, unless and until the advertising fees were "paid in". Since Respondent was suing for nonpayment of the advertising fees, it necessarily follows that the advertising services were never performed.

However, the answer to the factual question of whether the franchise agreements were executory or executed did not commend itself to the Court of Appeals. In addition to fabricating a new and theretofore unrecognized category of contract, namely, "non-executory in its nature", the Court of Appeals erred by basing its ruling on exceptions and modifications to the law of Michigan which had already been rejected by the Supreme Court of Michigan.

For example, the Court of Appeals ruled that there was no error "in the district court's construing the contract to be indivisible . . ." (App. C, *infra*, p. C-6). However, the Supreme Court of Michigan has already held that whether a contract is indivisible is irrelevant in determining the rule of law in Michigan concerning the appropriate measure of damages for breach of an executory contract.

Because *Rood, supra,* was decided two years after *Stroud, supra,* the plaintiff-appellant in *Rood* strenuously insisted that the *Rood* case should be distinguished from the *Stroud* case on several grounds, including:

> "(3) That notwithstanding this contract covers both board and tuition, it is an indivisible contract, and plaintiff is entitled to recover

> the full consideration." *Rood, supra,* 253 Mich. at 485.

The Supreme Court of Michigan acknowledged that it was "mindful of plaintiff's contention that the instant contract covering both board and tuition is indivisible." *Rood, supra,* 253 Mich. at 489. However, the Court ruled:

> "We think this does not change the rule of law that plaintiff must prove the amount of its damages. It has been repeatedly applied by the courts of this State to contracts which were indivisible in the same sense appellant contends this contract is indivisible. [Citing two Michigan Supreme Court cases]." *Ibid.*

Clearly, the distinction as to whether a contract is divisible or indivisible is not one which has commended itself to the Supreme Court of Michigan.

In addition, the Court of Appeals considered it to be significant that there was a provision in the franchise agreements that the contracts would be interpreted according to Louisiana law. The Court of Appeals stated:

> ". . . we must determine, from the nature and language of the contract, the parties' intent in entering into the franchise agreement under Louisiana law." (App. C, *infra,* C-6)

The Supreme Court of Michigan does recognize a provision in a contract that the contract be interpreted according to the laws of a foreign state. *Rubin* v. *Gallagher,* 294 Mich. 124 (1940). However, even in that instance, ". . . the procedure and remedy for the enforcement of such substantive rights in Michigan are governed by the laws of . . . [the] State [of Michigan]." *Id* at 127.

The Court of Appeals affirmed the clear departure from *Stroud* and *Rood* by the district court and, therefore, "contravene[d] the fixed policy of the law" of the State of Michigan. *Rood, supra*, 253 Mich. at 490.

As discussed above, the *Erie* doctrine mandates that, in a diversity case, the federal court must follow and apply the law of the state where the federal court sits. In the instant diversity case, the mandate of *Erie* was violated where the district court imposed on Petitioners a harsh remedy for breach of an executory contract, which remedy is contrary to the law and is not available in the courts of the State of Michigan.

Moreover, the Court of Appeals erroneously affirmed this violation of the *Erie* doctrine by misstating the record, by fabricating a new and theretofore unrecognized category of contract, and by adding exceptions and modifications which have not commended themselves to the Michigan Supreme Court.

CONCLUSION

This Court should review the instant case for the reason that the conflict between the applicable law of the State of Michigan and the harsh remedy imposed by the district court is clear and unmistakeable. The district court, sitting in Michigan, deprived Petitioners of their property without due process of law and subjected Petitioners to invidious and unreasonable discrimination. The district court flagrantly violated the *Erie* doctrine.

In addition, the Court of Appeals affirmed this denial of due process, discrimination and violation of the *Erie* doctrine, by misstating the record and by erroneously fabricating a category of contract which had theretofore been unknown and unrecognized.

There has been a gross miscarriage of justice!

For all the foregoing reasons, Petitioners respectfully urge this Honorable Court to grant this petition for a writ of certiorari.

Respectfully submitted,

By: /s/ ROBERT V. SEYMOUR (P20251)
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DATED: January 30, 1989

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

MOTION FOR SUMMARY JUDGMENT ON COUNTERCOMPLAINT

(United States District Court —
Eastern District of Michigan — Southern Division)

(Proceedings of March 31, 1987)

(WILLIAM F. GREGORY, MICHAEL C. SULLIVAN and SULLIVAN-GREGORY, INC., a Michigan corporation, Plaintiffs, vs. POPEYE'S FAMOUS FRIED CHICKEN & BISCUITS, INC., formerly known as POPEYE'S FAMOUS FRIED CHICKEN CORPORATION, a Louisiana corporation, Defendant — Case No. 85-CV 71383 DT)

Proceedings had in the above-entitled cause before the Honorable Lawrence P. Zatkoff, on March 31, 1987.

APPEARANCES: *On Behalf of Plaintiff*, RALPH W. BARBIER, JR., 34820 Harper Avenue, Mt. Clemens, MI 48043; *On Behalf of Defendant*, LAWRENCE R. ABRAMCZYK, Suite 1100, 400 Renaissance Center, Detroit, MI 48243.

* * *

(3) Detroit, Michigan
March 31, 1987

CLERK: Civil Action Number 85-71383, William F. Gregory versus Popeye's Famous Fried Chicken and Biscuits, Incorporated.

MR. ABRAMCZYK: May it please the Court, at this stage, the Court has dismissed the complaint. It has before it the defendant's counterclaim. It is our position there are no genuine issues as to any material fact relative to the claims made in the counterclaim and that defendants are — or defendant is entitled to judgment as a matter of law pursuant to Rule 56.

Your Honor, the counterclaim has eight counts. I have an additional copy for the Court if the Court desires to look at this while I speak.

THE COURT: Yes. I have a copy, of course, in the file, but it would be more convenient to receive it in this form.

MR. ABRAMCZYK: Before we begin reviewing it, I'll give the Court an overview. There are eight counts. The first six counts relate to the six stores, specifically the six franchise agreements. The last two counts relate to the two promissory notes.

In those first six counts, Popeye's claims there have been defaults by all three defendants of each franchise (4) agreement and specifically the defaults consist of the failure to pay franchise royalties and advertising fees. We plead (a) the existence of the contract and its execution of the counterdefendants; (b) the inclusion of the contract of the provisions to pay the franchise royalty of 5 percent gross sales and advertising fees on a weekly basis of 3 percent gross sales.

Count III, the counterdefendants have failed to pay the franchise royalties and advertising fees as specified in the counterclaim over the period of which the nonpayment occurred through the date of filing. We then allege that the nonpayment constitutes an event of default and find Popeye's has been damaged in the amount of that payment.

Now, let's talk for a moment about where we were in terms of the counterdefendants' position before this trial began, let's talk about how the counterdefendants

responded to the counterclaim. This will take but a moment and I'm going to run this first through the first count because Counts III, IV, V and VI are identical in terms of the allegations and replies to those allegations.

Your Honor, paragraph one of this counterclaim is admitted. Paragraph 2 is admitted. Paragraph 3 is admitted. Paragraph 4 is admitted. Paragraph 5 is admitted. Paragraph six is admitted. Paragraph 7 we will show in Count I is admitted. Paragraph 8 is admitted. Paragraph 9 is (5) admitted. Paragraph 10 is admitted.

At this point, the manner of pleading by the counterdefendants changes a little bit so we get into the substance of each paragraph of the countercomplaint. And paragraph 11 says as of May 14, 1985 counterdefendants were delinquent in the payment of 144 weeks franchise royalties totaling 98,899.18. And that paragraph the counterdefendants neither admit nor deny the allegation.

They also admit, however, they made — they did not pay the franchise royalties, but they neither admit nor deny the amount. So we have an admission of the fact of nonpayment and then I'm left to my proofs on the amount. First this represents the first issue of disputed fact that I faced before trial began.

Now, at this point in trial, where are we on that allegation? I've noted in my margin on the counterclaim we have Exhibit 184, a stipulated exhibit, perhaps we could get that in front of us. And I have an additional copy, if the Court needs it.

THE COURT: No. I have it.

MR. ABRAMCZYK: All right. Stipulated Exhibit 184 indicates, first, with respect to advertising fees and at the bottom of the page with respect to royalties, the delinquencies broken down by store, by total amount per store and then by the opening periods, that is the weeks in which (6) payments did not occur.

At this point in time of the counterclaim we are only talking about the bottom part of that sheet, franchise royalties. It's a stipulated exhibit. Counterdefendants admit, by virtue of the fact of nonpayment, they've already admitted that in the pleading. But now they admit further they have not paid franchise royalties for Store 208, Troy store, in the amount of $139,139.22 for the weeks that are listed on the right-hand side.

Counterdefendants admit they have not paid franchise royalties for Store 311, Pontiac store, in the amount of $102,687.77 for the period referenced in the right-hand side.

Counterdefendants admit that they have not paid franchise royalties for Store 361, the amount showing on the sheet for the weeks showing on the sheet. They admit — and Store 361 is the West Bloomfield store.

They make a comparable admission of nonpayment for the Mt. Clemens store, number 377, in the amount shown for the weeks shown.

Make an admission of the fact of nonpayment for the period of nonpayment for store 430, the Southfield store, in the amount shown for the weeks shown.

And finally they admit, by virtue of admission of this exhibit, the fact of nonpayment, amount of nonpayment (7) for the period of nonpayment for the Utica store for the last year. The store was closed and the Court will note this exhibit does not reflect delinquency for the franchise royalties after the date of closure, so we are not seeking royalties beyond the date of closure.

THE COURT: Is there any dispute as to what this exhibit means?

MR. BARBIER: No.

THE COURT: You agree with what Mr. Abramczyk has said.

MR. BARBIER: I agree the amounts aren't paid. I don't agree nor do I dispute the amounts that are on there.

MR. ABRAMCZYK: So I would submit at this point, paragraph 11 of that counter claim has been covered. The only open area was the counterdefendants refusing to admit or deny as of the date of filing their answer to the counterclaims the amounts or periods involved. We are now over that hurtle, that's no longer a disputed fact. We now move to paragraph 12 of the counterclaim.

At that point, Popeye's has plead delinquency of fees of advertising fees over a 144 week period in the amount of $85,003,514 for this particular store covered by Count I. And Count II, III, IV, V and VI have the same kinds of allegations relative to the nonpayment of advertising fees for the other stores. We had a reply, an answer to the (8) counterclaim which admitted the fact of nonpayment of advertising fees in each count, but again left us to our proofs as to the amounts and the periods.

I would submit again that stipulated Exhibit 184 overcomes the need at this point in time for proofs as to the amounts of advertising fees that haven't been paid and the periods to which and stores to which they relate. Now of course I'm addressing the Court's attention to the top half of Exhibit 184 wherein there is detail for advertising fee delinquencies. I'm not going to go through this the second time, the format is exactly the same.

I submit, with respect to paragraph 12 of the counterclaim and the corresponding paragraphs in Count II, III, IV, V and VI, there are no facts to try. The amounts that have not been paid are stipulated to, stores to which they relate have been stipulated to by virtue of this exhibit. Periods of which the stores are delinquent have

been stipulated in which they occur. So paragraph 12 is no longer a subject of the trial.

Let's move to paragraph 13. Paragraph 13, I plead the counterdefendants failure to pay the advertising fees and royalties are defects of the franchise. Paragraph 3 the counterdefendants admitted their failure to pay, but they neither admitted or denied the legal conclusion that the failure to pay these royalties and fees constituted an event of (9) default. Let's address that issue.

Is the failure to pay royalties and advertising funds an event of default? At this point, I would address the Court's attention to the franchise agreements themselves. As the Court will recall, the franchise agreements are identical in content from store to store. That being the case, we need look at only one. I would address the Court's attention to Exhibit 3 which is the franchise agreement for the Troy store and I would ask that the Court look specifically at page 19 of Exhibit 3. Does Your Honor have that page?

THE COURT: Yes, I do.

MR. ABRAMCZYK: Paragraph 13 is titled termination and I would like to read — I believe it is the third sentence which is about five lines down and starts with the word franchisee. It says:

> "Franchisee shall be in default hereunder for any failure substantially to comply with any of the requirements imposed by this franchise agreement, as it may from time to time reasonably be supplemented by the confidential operating manual or otherwise in writing, or to carry out the terms of the franchise agreement in good faith, including, without limitation. Any of the following events:
> "Number 1, if franchisee fails or refuses promptly to pay any monies owing to franchisor or its (10) subsidiaries" . . .

There's more in the sentence, but that's the relevant portion.

So, counterdefendants in paragraph 13 of their answer say their nonpayment — or don't admit their nonpayment isn't an event of default.

I submit the contract language that I have just quoted makes it very clear that the nonpayment is an event of default. So far as I'm concerned, there's nothing to try at this point in time under paragraph 13.

We move to paragraph 14 which is the final paragraph of the counterclaim. At that point, I plead that as a result of their breach we have been damaged in the amounts that haven't been paid and the counterdefendants deny that there's been any breach and they neither admit nor deny or make allegations.

I pointed out that that pattern of pleading goes right through their answer and, at the end of the answer, an affirmative defense is raised. And that affirmative defense — and I'll paraphrase — we don't owe the money because of the breach of contract we have plead in our complaint against Popeye's. As the Court is obviously aware they were given their day in court on the complaint and they didn't carry their burden of proof and that complaint was dismissed. With that dismissal came the basis for their refusal and failure to pay. The Court found that they haven't proven any breach of contract (11) by Popeye's.

So, at this point in time, with respect to Counts I through VI, they've admitted the contract, they have admitted the provisions in the contract requiring the many payments, they have admitted the fact of nonpayments, they have stipulated the amounts of nonpayment. I have shown that nonpayment is an event of default. What's left to try? I submit at this point in time we are entitled to judgment, that's with respect to Counts I through VI.

Counts VII and VIII deal with the two promissory notes that were signed in 1982. And their admissions of the execution of the promissory notes are made, admissions of the fact that the promissory notes have not been repaid in accordance with their terms. And then in 184 at the bottom we have an admission as to the amounts due on the notes. For purposes of this stipulated Exhibit 184, we put the two notes together. It says amount due on notes, $5,358.66. That represents the balance on the two promissory notes by the admission of the defendants. I submit, again, the compilation of the admissions in the exhibits preclude the need for any proofs at this time.

What else am I asking for? I'm asking for interest on the unpaid fees. Does the contract call for the payment of interest? Is this a question of what the contract says? Look at paragraph III(C) page 4 of Exhibit 3, page 4 of (12) the franchise agreement. At that point, about two thirds of the way down, contract reads:

> "If any monetary obligations owed by franchisee to franchisor and its subsidiaries and affiliates are more than seven days overdue, franchisee shall, in addition to the obligation, pay to franchisor, a sum equal to one and one half percent of the overdue balance per month, or the highest rate permitted by law, whichever is less."

So there is a predicate in the contract for the imposition of interest.

Exhibit 184 contains the stipulation of the parties as to the amount of interest that's due and I would just add, parenthetically, certain amounts of interest have been waived by plaintiff. These are the amounts of interest due by stipulation of the parties.

I would ask in my motion for summary judgment that all three defendants, Michael Sullivan and William Gregory and their corporation Sullivan and Gregory,

Inc., be found liable for these sums jointly and severally. And the basis for that claim again is contract language. The opening language contained in the contract makes it very clear that these gentlemen are signing jointly and severally. If the Court will look at page one of the Exhibit 3, franchise agreement, I think it is very clear the words jointly and severally have been (13) typed in after their names in capital letters. And, if the Court will recall, there was testimony at trial elicited by Mr. Barbier from his own clients that they indeed signed the agreements in their individual capacities, obligating them in their individual capacities. And so, I would submit that on the question of joint and several liability, there is no need for proofs.

So, Your Honor, that's the basis for the motion. At this point in time, I don't feel there are any disputed issues of fact to be tried.

THE COURT: Mr. Barbier?

MR. BARBIER: For the record, we have put in our proofs and would adopt our position we took in our original complaint. Obviously, I would not take the time to reargue that. I have argued it to the Court, the Court has ruled against me.

But I do add, as far as the franchise — excuse me, as far as the advertising fees are concerned, it really is a illusory contract. By their own admission during trial, they in fact said that it is money in-money out. They have not sustained any damage with regard to the contract and in fact, the other exhibits which we had marked and had been admitted show that the owner of Popeye's in fact owes well over, I think it is, two million dollars to the fund. And therefore, it is our position and I will not — The case law we cited on page 10 (14) and 11 and 12 of our trial brief sets forth our position that they should not be entitled to this because in fact they have not sustained any damage.

The contract does in fact call for a three percent advertising fee. We do not dispute that. But notwithstanding that the Louisiana law is well settled, there must be mutuality of obligation in order to enforce a contract and it should not be illusory. In fact, this one is. They wish us to now come back and pay funds that they did not pay, they did not use, they did not suffer any damages as a result of this alleged breach in the countercomplaint. And, therefore, a logical construction of this would mean it is not due and owing. The simple fact a contract calls for payments when nothing in fact is paid or used, then I don't see how they can argue there has been any damage.

Secondly, as far as the administrative fee which was supposed to be one percent or one third of the amount owing in 184, there's been nothing to administer. And I would submit to the Court again, in their own accountings that have been submitted in this trial, it shows that there are millions owing in that particular fund to the owner of Popeye's, that funds are used out of that particular Advertising Fund from our dollars to pay his expenses and therefore I do not think they're entitled to collect something they haven't used and haven't been damaged.

(15) And, therefore, our position is, on the Advertising Fund, in addition to what we have argued before, they are not entitled to any amounts.

THE COURT: Do you wish to respond to that?

MR. ABRAMCZYK: Yes, sir.

The argument seems to be that if you don't pay the advertising fees in, then they can't be spent on local and regional advertising and weren't spent on local and regional advertising, therefore, we don't owe them, we haven't been damaged.

That argument fails because the advertising fees fund advertising on an ongoing basis. And the testimony

shows that production and administration costs are charged back to franchisees on an ongoing basis. Deficits grow per those accounting statements and the franchisees local and regional advertising accounts and the production and administration expense category were not paid. So, with respect to one percent of the three percent, there's no question the client has been damaged.

The money has been spent, it has been charged back to the franchisees. And what happens is that when it is not paid, it is charged to other franchisees system wide to a reserve, so the damages are very real.

What about the other two percent that Mr. Barbier claims should not have to be paid because when it was (16) paid, no advertising was done on a local and regional level? It is Popeye's intention and desire to utilize that money for spending in this marketplace, for hard spending in this marketplace, when it is paid, that's why that provision is in the contract. That's why the contract says that the money doesn't have to relate to a particular accounting period and Mr. Jorgensen testified about it being rolled over in the early stages of these franchisees franchise existence.

So, if a franchisee doesn't pay it, it is not just forgotten about. That money is denied to this marketplace in the future. And it is the franchisors intent per this contract provision to insure that advertising is going to be placed in this marketplace in the future by requiring the payment of fees.

Popeye — the other franchisees in this marketplace, Mr. McMurtry and Clark are denied advertising to which they're entitled when these franchisees' advertising fee indebtedness is forgiven by the Court vis a vis the argument made by Mr. Barbier. That is a hard debt. The contract calls for the payment of franchise and advertising fees every week in the amounts speci-

fied for every week, that the franchisee uses the franchise. That's the way the contract reads and that's what we're asking. And if, after they paid the monies that they owed and it is not spent in accordance with the contract, then they have a cause of action for breach of contract by (17) Popeye's. But at this point in time they don't have that cause of action.

Popeye's has the cause of action for collection, contract calls for payment on a weekly basis. They've said we don't owe it because you breached the contract Popeye's. The Court said yesterday, Popeye's — the Court said to the plaintiff you didn't meet your burden of proof, you didn't show any breaches. So the obstacle to payment is removed. We have a contract calling for weekly payment, the fact of nonpayment, the reason for nonpayment given is the breach by Popeye's, that reason has been eliminated.

So, what's before the Court is the obligation to pay advertising fees on a weekly basis per this contract provision and that's what we're asking be enforced. If the advertising fees, if the Advertising Fund isn't administered in accordance with the terms of the contract after the monies are paid, then they have another day in court to come in and say we paid, whatever the figure is, 350 some thousand dollars of advertising fees per the contract per the instructions of the court enforcing this contract and per the fund that Popeye's has established.

I submit, Your Honor, they are indeed required to pay the fees.

THE COURT: What about the two million dollars that's owed by another franchisee that was not collected.

(18) MR. ABRAMCZYK: If the Court will remember, that was the testimony of one of these gentlemen. It wasn't the testimony of anyone from Popeye's.

THE COURT: That was an exhibit.

MR. ABRAMCZYK: That was a Coopers and Lybrand statement. It is my understanding that's just a snapshot as to a particular date a period in time, end of years. There's a drag on receivable that shows as to the end of the fund, it shows as a liability to the fund. In fact, that's a good argument why they have to pay it. Coopers-Lybrand come in, they audit the fund, they see this receivable and they show the world at large that it is an asset of the fund. What does that tell the world at large? The fund is going to collect that money, it is an asset of the fund's, that's why it is shown as an asset of the fund.

The auditors say the money is owed and it's got to be paid. And it was going to be paid. If it wasn't going to be paid, it wouldn't show it as an asset. That argument mitigates against what they're saying. If what they're saying is true, if the monies aren't paid and after a passage of time the advertising isn't placed and money is not due, Coopers and Lybrand would not have received the two million dollars from Copeland Enterprises as an asset. But Coopers and Lybrand do carry it as an asset, it is an asset to the fund, it is a corresponding liability to Copeland Enterprises. It has got to (19) be paid. That's why we're standing here.

I'm saying that to the fund, the advertising fees that these men owe is an asset. To them, just as to Copeland Enterprises, it is a liability to Mr. Gregory and Sullivan. I'm asking the Court make them pay that admitted liability to the fund so the fund can take that asset and spend it. I'm asking the Court to enforce the Coopers and Lybrand audit.

MR. BARBIER: May I respond breifly?

THE COURT: You may.

MR. BARBIER: Your Honor, not only will the exhibit clearly show that the — I refer the Court to Exhibit 182 — 181 which is for the years 1984 and '85.

MR. ABRAMCZYK: What's the number, counsel?

MR. BARBIER: 181.

THE COURT: I have it.

MR. BARBIER: It says that related party receivables for '84 and '85 and they not only show the money isn't paid, but now they're letting him write it off to the tune of almost a half a million dollars, quarter of a million before that as doubtful receivable. Which is very convenient for the owner and not to pay into the fund and simply write it off. On related party transactions, you will see that they have expended money to A. Copeland Enterprises. In a closely-held corporation, Your Honor, there's a lot of stuff (20) that can be used to protect someone and I would suggest to this Court that again, it is an illusory contract that hundreds of dollars of thousands of dollars owed by the Copeland Enterprises as per these exhibits clearly show there is no intent to ever collect this money, but in fact write it off over a period of time letting Mr. Copeland off the hook and therefore to come into this Court and suggest that now my clients should now pay into the fund when it's not in fact used the way counsel has suggested.

MR. ABRAMCZYK: Mr. Barbier is dead wrong on that footnote. The receivable from Copeland Enterprises, the company operated stores that Copeland Enterprises runs and others are receivables from people like Mr. Gregory and Mr. Sullivan. That's others. And there's an accounting charge to a loss reserve when the others, like Mr. Gregory and Mr. Sullivan, go delinquent for three years. We have heard no testimony at all about a charge off of the Copeland Enterprises receivable. I'm prepared to offer proofs if you want to get into it.

Now counsel is arguing beyond the exhibit. The only testimony was his own client's impression of this footnote. But the language here is A. Copeland Enterprises

receivable in the amount of $100,666. Others — something other than A. Copeland Enterprises, Inc. — a receivable of $1,219,573.

(21) THE COURT: Gentlemen, I see that as a collateral issue, whether it may or may not be something that the franchisees would want to take up as a group, if what counsel for plaintiff says is true, that's a collateral issue, in my opinion, to this litigation.

For the reasons stated on the record by counsel for the defendant and counterplaintiff, this Court is going to enter a summary judgment in favor of the defendant in the counterclaim in the amount set forth in the Joint Exhibit 184.

MR. ABRAMCZYK: Does the Court find the liability to be joint and severable.

THE COURT: The Court finds the liability to be joint and several.

MR. ABRAMCZYK: Thank you.

THE COURT: Gentlemen. What would you like to do with the exhibits pending an appeal in this action?

MR. ABRAMCZYK: I would request that Mr. Barbier keep them, if that is all right with them, or I'll take them.

MR. BARBIER: No, no. I'll take them.

THE COURT: I'm going to retain the Court copy of exhibits that have been furnished to me and we will retain these for approximately six months or thereabouts. I'm going to order then that counsel for the plaintiff take custody of the exhibits that have been received here during this trial. Is there anything that either counsel wishes to place on the (22) record at this time?

MR. ABRAMCZYK: Defendants do not, Your Honor.

MR. BARBIER: Nothing, Your Honor.

THE COURT: Thank you for your attention in this matter, gentlemen.

(Proceedings concluded at 8:55 am.)

(Certificate of Reporter Omitted)

APPENDIX B

JUDGMENT

(United States District Court —
Eastern District of Michigan — Southern Division)

(April 3, 1987)

(WILLIAM F. GREGORY, MICHAEL C. SULLIVAN and SULLIVAN-GREGORY, INC., a Michigan corporation, Plaintiffs/Counter-Defendants, vs. POPEYES FAMOUS FRIED CHICKEN & BISCUITS, INC., formerly known as POPEYES FAMOUS FRIED CHICKEN CORPORATION, a Louisiana corporation, Defendant/Counter-Plaintiff — CASE NO. 85-CV-71383-DT; HON. LAWRENCE P. ZATKOFF)

AT A SESSION of said Court held in the United States Courthouse in the City of Detroit, State of Michigan, on the 3rd day of April, 1987.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF, UNITED STATES DISTRICT JUDGE.

This matter having come before the Court for trial; Defendant having made a motion to dismiss at the conclusion of Plaintiffs' case; the Court, in a ruling from the bench on March 30, 1987, having granted Defendant's motion to dismiss for the reasons stated on the record; Defendant thereafter having moved for summary judgment on Defendants' counterclaim; the Court, in a ruling from the bench on March 31, 1987, having granted Defendant's motion for summary judgment for the reasons stated on the record, said judgment being in the specific amounts detailed on stipulated trial exhibit 184,

IT IS HEREBY ORDERED that Plaintiffs' Complaint is dismissed with prejudice, and

JUDGMENT IS HEREBY ENTERED in favor of Defendant/Counter-Plaintiff Popeyes Famous Fried Chicken & Biscuits, Inc., and against Plaintiffs/Counter-Defendants William F. Gregory, Michael C. Sullivan and Sullivan-Gregory, Inc., jointly and severally, in the amount of Nine Hundred Twenty Six Thousand Four Hundred Twenty and 79/100 ($926,420.79) Dollars, together with interest from the date hereof computed in accordance with the provisions [*of*] 28 USC 1961, to wit, five and 68/100 (5.68%) percent, computed daily and compounded annually.

/s/ LAWRENCE P. ZATKOFF,
UNITED STATES DISTRICT JUDGE

(Certification Omitted)

APPENDIX C

OPINION
NOT FOR PUBLICATION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals – Sixth Circuit)

(Filed September 9, 1988)

(WILLIAM F. GREGORY, MICHAEL C. SULLIVAN, and SULLIVAN-GREGORY, INC., Plaintiffs and Counter-Defendants-Appellants, v. POPEYES FAMOUS FRIED CHICKEN AND BISCUITS, INC., formerly known as POPEYES FAMOUS FRIED CHICKEN CORPORATION, Defendant and Counter-Plaintiff-Appellee — No. 87-1461; ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN)

BEFORE: **KEITH** and **WELLFORD**, Circuit Judges; and **EDWARDS**, Senior Circuit Judge.

PER CURIAM.

We are concerned in this appeal with a dispute over restaurant franchises centering upon the plaintiff/franchisee's nonpayment of advertising fees and the defendant/franchisor's duty to advertise. Sullivan-Gregory, Inc. (SGI) sued Popeyes, Inc. (Popeyes), alleging breach of Popeyes' duty to provide adequate advertising, and Popeyes counterclaimed for franchise royalties and advertising fees due under the franchise agreements. The district court dismissed SGI's action against Popeyes for failure to establish a prima facie

case, and then proceeded to enter summary judgment for Popeyes on its counterclaim. We affirm the district court's decisions in both respects.

Popeyes is a Louisiana franchisor of spiced fried chicken restaurants. SGI is a Michigan corporation whose sole shareholders are two businessmen, Sullivan and Gregory. In 1978, SGI entered into franchise option agreements with Popeyes for the development of Popeyes franchises in Detroit suburban areas. Over the next five years, SGI developed six Popeyes franchises in the area, each covered by a separate agreement. Under these franchise agreements, SGI was obligated to pay an initial franchise fee of $20,000, a weekly royalty fee in the amount of 5% of gross sales for the preceding week, and a weekly advertising fee in the amount of 3% of gross sales for the preceding week.

Even as SGI began opening additional new restaurants in the early 1980s, it was experiencing losses in its existing stores. Business suffered from economic recession in Detroit and from the entry of Kentucky Fried Chicken into the spicy chicken market in the Detroit area. Shortly after opening its first restaurant, the franchisee fell behind in its payment of royalties and advertising fees. Over the years these delinquencies increased, until at the time of trial, the combined delinquencies (including the amount of promissory notes executed embodying delinquencies) amounted to more than $900,000. Notwithstanding these delinquencies, SGI continued to operate the Popeyes franchises and to receive operational support from Popeyes. During the early 1980s, Popeyes also provided advertising and marketing support and, eventually, radio and television advertising in the Detroit area.

In March 1985, SGI filed its complaint against Popeyes, alleging that Popeyes had breached its duty under the

franchise agreements to provide adequate advertising or promotion. Popeyes counterclaimed against SGI for failure to pay franchise royalties and advertising fees due under the six franchise agreements and to collect money due under two defaulted promissory notes. Following SGI's presentation of proof at trial, Popeyes moved the district court to dismiss the action. The motion was granted on the ground that SGI had failed to establish that Popeyes had breached any provision of the franchise agreements regarding advertising. Following an oral hearing, the court granted Popeyes' motion for summary judgment on its counterclaim and entered judgment against SGI in the amount of $926,420.79.

SGI argues that the district court erred in its construction of the franchise agreements. First, it contends that the agreements should have been construed against Popeyes as drafter thereof and, further, that they should have been read to require what SGI considered to be "adequate" advertising. The agreements each contain an integration clause and a choice of law provision stating that Louisiana law shall govern the interpretation of the agreement. The agreements state the following with regard to advertising by Popeyes:

> . . . Franchisee, recognizing the value of advertising and the importance of the standardization of advertising and promotion to the goodwill and public image of the POPEYES Famous Fried Chicken System, agrees to pay to The POPEYES Famous Fried Chicken Advertising Fund a recurring, non-refundable advertising fund contribution to be paid on a weekly basis, . . . of three percent (3%) of the gross sales for the preceding week . . . , which sum shall be expended by The POPEYES Famous Fried Chicken Advertising

> Fund . . . , administered for national, regional and local advertising and promotional materials for the POPEYES Famous Fried Chicken System. All reasonable costs incurred by Franchisor . . . for the production and dissemination of such advertising and promotional materials may be charged to The Advertising Fund . . . . *There shall be no requirement that all or any part of the Fund be disbursed within any accounting period. Selection of media and locale for media placement shall be at the sole discretion of the Administrator of The Fund.* Franchisee understands that such advertising is intended to maximize the public's awareness of POPEYES Famous Fried Chicken restaurants, and that *Franchisor accordingly undertakes no obligation to insure that any individual franchisee benefits directly or on a pro rata basis from the placement, if any, of such advertising in his local market.*

(Emphasis supplied).

SGI complained that Popeyes failed to commit funds to broadcast media advertising in the Detroit area when SGI first opened its stores (the first in the Detroit area), instead waiting until 1981 when several of SGI's Popeyes franchises had opened. Essentially, it asserts also a failure to provide adequate advertising in the Detroit area to counter competitive entries into the spicy chicken market. The district court interpreted the above stated provision of the franchise agreement to leave to the Fund Administrator's discretion the timing, selection, and placement of advertising. Furthermore, the district court held that the agreement did not require the Administrator to undertake the duty to please individual franchisees, including SGI, by selecting advertising that specifically benefitted a par-

ticular market or a particular store. SGI did not allege or prove a complete failure by Popeyes to provide advertising and promotional materials; instead, it alleged that Popeyes had provided too little advertising in Detroit and not as much promotional assistance as SGI believed was necessary to give it the "help" needed.

We find no error in the district court's conclusion that SGI failed to establish a prima facie case of Popeyes' breach of any contractual obligation relating to the franchises. SGI's argument that the franchise agreements were contracts of adhesion to be construed in the franchisee's favor is not persuasive. Plaintiff's complaint was not, therefore, improperly dismissed.

The franchise agreement between the parties provides that the agreement "shall be interpreted and construed" under Louisiana law. Michigan courts hold such contractual choice of law provisions importing a foreign state's substantive law to be valid and enforceable. *See, e.g., Hardy* v. *Monsanto Enviro-Chem Systems, Inc.*, 414 Mich. 29, 323 N.W.2d 270, 294 (1982); *Rubin* v. *Gallagher*, 294 Mich. 124, 127, 292 N.W. 584 (1940). Therefore, Michigan courts would honor the parties' intent that obligations under the contract be resolved under Louisiana law.

Even when the parties have chosen a foreign law to govern the interpretation of their contract, however, Michigan law, as *lex fori*, still governs questions of procedure and of the remedies available to the parties. *See Rubin*, 294 Mich. at 128; *Mt. Ida School for Girls* v. *Rood*, 253 Mich. 482, 486, 253 N.W. 227 (1931). In an action such as this, the remedy available to the plaintiff is the *remedy* afforded by Michigan law. *Rubin*, 294 Mich. at 128.

The choice of law question in this case relates to the question of damages owed by SGI arising from its delin-

quency in payment of advertising fees due under the franchise agreements. SGI contends that the district court erred in finding it liable in the total amount of delinquent fees claimed. It claims that the agreement to pay advertising fees was executory because Popeyes administered the advertising fund on a "money in, money out" basis; therefore Popeyes' performance of the franchise agreement was dependent on and would occur *after* SGI's payment of advertising fees. Under Michigan law, a party to an executory contract is liable only for actual damages resulting from a breach, and not necessarily for the full contract price. *See Rood*, 253 Mich. at 486; *Walton School of Commerce* v. *Stroud*, 248 Mich. 85, 88-89, 226 N.W. 883 (1929). Therefore, SGI maintains that it should be held liable only for actual damages suffered by Popeyes and not for the total delinquency claimed. (There was no real dispute as to the total amount claimed under the agreements.)

We must therefore decide whether the advertising fees provision in the franchise agreements was in fact an executory agreement that was independent of the rest of the terms of the franchise agreement. To do this we must determine, from the nature and language of the contract, the parties' intent in entering into the franchise agreements under Louisiana law.

Under Louisiana law, an agreement which contains several different undertakings is construed generally contrary to the notion that the different undertakings are independent and divisible. *Cf. Stockstill* v. *Byrd*, 132 La. 404, 61 So. 446 (1913). SGI's several undertakings, as well as Popeyes', would therefore be considered as dependent and part of the whole agreement absent language indicating the contrary. We believe there was no error demonstrated in the district court's construing the contract to be indivisible and nonexecutory in its

nature. *Cf. S&W Investment Co.* v. *Otis W. Sharp & Son, Inc.*, 247 La. 158, 170 So.2d 360 (1964). Louisiana law enforces a contractual requirement in accordance with the plain language of the agreement and in order to ratify the expressed intent of the parties. *Domed Stadium Hotel, Inc.* v. *Holiday Inns, Inc.*, 732 F.2d 480, 484 (5th Cir. 1984). We believe the district court has followed this precept in this case.

Considering the question of damages to be a matter of remedy governed by Michigan law, as that of the forum state, we note that SGI did not contest Popeyes' claim by asserting before the district court that Popeyes had not proved its performance. Rather, SGI claimed that Popeyes was required to establish the amount of actual damages caused by SGI's default in paying the contractual royalties and advertising allowances. It also claimed a defense against Popeyes of "supervening impossibility of performance," asserting that payment of the fees was impossible because it was "losing thousands of dollars and was closing its stores," citing *Bissell* v. *L. W. Edison Co.*, 9 Mich. App. 276, 284-85, 156 N.W.2d 623 (1967). (See appellant's reply brief at pp. 19, 20).[1] We conclude that an "impossibility" defense based upon economic recession and the failure of a franchise business to live up to its hoped for potential is not a viable affirmative defense to a claim of debt for failure to pay an unambiguous contractual obligation.[2]

The agreements in question indicated the parties' intent that advertising fees (and royalty fees) were to be

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[1] SGI's other affirmative defense, that Popeyes had breached the agreements, was foreclosed by the district court's finding that SGI had failed to make out a prima facie case on its original claim.

[2] A part of SGI's claimed defense of impossibility of performance pertained to its assertion that the advertising fund was mismanaged. We perceive no error in the district court's decision that this was a collateral, and essentially immaterial, issue.

utilized for the ongoing promotion of the Popeyes system as a whole. They did not provide that advertising and promotion services were first to be performed in the Detroit area before SGI's obligations to pay the fees were triggered. During the entire period in dispute, SGI was accorded the franchisor's product line, food techniques and formulas, restaurant design and operating procedures, logo, store manuals, and the like. Whether SGI's stores directly received $925,000 worth of Detroit area newspaper, television andother media advertising is not the question; under the franchise agreements, Popeyes was not obligated to allocate SGI's payments to Detroit area advertising. SGI utilized Popeyes' services and name during the period involved, and it had an interrelated, dependent obligation to make the prescribed payments for these services, even though the services were not as extensive or "helpful" as SGI desired. SGI incidentally acknowledged its ongoing liability from time to time by executing promissory notes representing unpaid and accrued cash obligations. The Michigan authority cited by SGI does not, in our view, support any contrary principles to those expressed herein.

SGI did not repudiate the franchise agreements during the period in dispute. It continued to operate the Popeyes franchise restaurants and continued to receive the benefits of the Popeyes support system. It cannot now complain that Popeyes must prove actual damages rather than the agreed contract fees due and payable arising out of SGI's ongoing breaches.

Nor do we find error in the grant of summary judgment by the district court. In reviewing the motion for summary judgment, we consider the evidence in the light most favorable to SGI, but we discern no genuine issue of material fact regarding SGI's liability on the

contract delinquencies. The district court found that SGI had not established a prima facie case of Popeyes' breach of contract. The fact and amount of nonpayment of franchise agreement fees were not disputed. Because SGI failed to allege any specific facts that could establish a genuine defense to its liability or to the amount thereof, we conclude that the district court's grant of summary judgment was proper. *See Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-24 (1986).

We accordingly **AFFIRM** the judgment for Popeyes.

APPENDIX D

ORDER

(United States Court of Appeals – Sixth Circuit)

(Filed November 4, 1988)

(WILLIAM F. GREGORY, ET AL., Plaintiffs and Counter-Defendants-Appellants vs. POPEYES FAMOUS FRIED CHICKEN & BISCUITS, INC., Defendant and Counter-Plaintiff-Appellee — NO. 87-1461)

BEFORE: **KEITH** and **WELLFORD**, Circuit Judges;
EDWARDS, Senior Circuit Judge.

The appellants have petitioned the court to rehear its decision of September 9, 1988, affirming the judgment of the district court.

The court has considered the petition for rehearing offered in support thereof. Finding no issue of law or fact that was overlooked or misapprehended, the petition is found not to be well taken.

It is therefore **ORDERED** that the petition for rehearing is **denied**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX E

ORDER

(United States Court of Appeals – Sixth Circuit)

(Filed November 9, 1988)

(WILLIAM F. GREGORY, ET AL., Plaintiffs and Counter-Defendants-Appellants vs. POPEYES FAMOUS FRIED CHICKEN & BISCUITS, INC., FORMERLY KNOWN AS POPEYES FAMOUS FRIED CHICKEN CORPORATION, Defendant and Counter-Plaintiffs-Appellees [*sic*] — No. 87-1461)

BEFORE: KEITH and WELLFORD, Circuit Judges, and EDWARDS, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX F

ORDER

(United States Court of Appeals – Sixth Circuit)

(Filed November 29, 1988)

(WILLIAM F. GREGORY, ET AL., Plaintiffs and Counter Defendants-Appellants vs. POPEYES FAMOUS FRIED CHICKEN & BISCUITS, INC., Defendant and Counter Plaintiff-Appellee — NO. 87-1461)

Upon consideration of the motion of the appellants to stay issuance of the mandate pending application for writ of certiorari, as well as the response of the appellee in opposition thereto,

It is **ORDERED** that the motion be and hereby is **granted** for a period of sixty (60) days from the date herein.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

(2)

No. 88-1291

FILED
MAR 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

WILLIAM F. GREGORY, MICHAEL C. SULLIVAN
and SULLIVAN-GREGORY, INC.,
a Michigan corporation,

Petitioners,

-vs-

POPEYES FAMOUS FRIED CHICKEN & BISCUITS, INC.,
a Louisiana corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO REVIEW JUDGMENT OF THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

– AND APPENDICES –

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COUNTER-STATEMENT OF QUESTION PRESENTED

Is there any special or important reason for this case to merit consideration by the United States Supreme Court?

COUNTER-STATEMENT OF CONSTITUTIONAL PROVISION INVOLVED

This diversity-of-citizenship case is, exclusively, a contract dispute, governed by state law. Thus far in the history of these proceedings, there has been no constitutional provision involved. No constitutional issues were briefed or argued in either the District Court or the Court of Appeals. None were addressed by either court, *sua sponte*. Petitioners now maintain, in retrospect, that their constitutional due-process rights have been violated.

DESIGNATION OF CORPORATE RELATIONSHIPS

Respondent is Popeyes Famous Fried Chicken & Biscuits, Inc., (now known as "Popeyes, Inc.") a Louisiana corporation. Popeyes, Inc. is a subsidiary of A. Copeland Enterprises, Inc., a Louisiana corporation.

Other subsidiaries of A. Copeland Enterprises, Inc., include Popeyes Famous Fried Chicken Advertising Fund, a Division of Popeyes, Inc., a Louisiana corporation; Copeland's Cajun Princess, Inc., a Florida corporation; Popeyes, B.V., incorporated in Amsterdam; Popeyes (Canada), Inc., a Canadian corporation; and National Development Corporation, a Louisiana corporation.

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No. 88-1291

In The

Supreme Court of the United States

October Term, 1988

WILLIAM F. GREGORY, MICHAEL C. SULLIVAN and SULLIVAN-GREGORY, INC., a Michigan corporation,

Petitioners,

-vs-

POPEYES FAMOUS FRIED CHICKEN & BISCUITS, INC., a Louisiana corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE[1]

1.

BACKGROUND

Petitioners herein are Michael C. Sullivan ("Sullivan"), William F. Gregory ("Gregory") and Sullivan-Gregory, Inc., a Michigan corporation, the stock of which is

[1] Several statements in Petitioners' "Statement of the Case" are inaccurate and misleading. Rather than address these disputed items on a sentence-by-sentence basis, Respondent has prepared the instant counter-statement of the case.

owned by Sullivan and Gregory. Respondent is Popeyes Famous Fried Chicken & Biscuits, Inc. (now known as "Popeyes, Inc."), a Louisiana corporation ("Popeyes").

Respondent owns proprietary rights in a restaurant system known as "Popeyes Famous Fried Chicken & Biscuits", which was, as of the time of trial of this cause, franchised to approximately 670 restaurant operators in the United States.

Sullivan-Gregory, Inc. executed six (6) identical-in-content franchise agreements for the operation of six (6) franchised Popeyes' restaurants in the State of Michigan. Sullivan and Gregory personally guaranteed the performance of Sullivan-Gregory, Inc.'s obligations under said agreements.

Sullivan-Gregory, Inc. opened its first Popeyes' restaurant in 1979 and, as of 1983, was operating six restaurants employing the Popeyes' franchise system. Sullivan-Gregory, Inc. continued utilizing its Popeyes' franchise rights at the restaurants through the time of trial, with the exception of one restaurant closed in late 1985.

Although employing the Popeyes' system (*i.e.*, utilization of Popeyes' trademark, trade name, operating manuals, food-preparation techniques, food formulas, packaging, menu board, etc.) throughout the period of operation of the stores and receiving ongoing operational support and assistance from Respondent, Sullivan-Gregory, Inc. failed to pay to Respondent franchise royalties and advertising, fees consisting of five percent of weekly gross sales and three percent of weekly gross sales, respectively, as required by the franchise agreements.

On March 28, 1985, Petitioners filed a complaint against Respondent in United States District Court for the Eastern District of Michigan, invoking jurisdiction

pursuant to 28 U.S.C. § 1332. Petitioners alleged Respondent had breached the advertising-fee provisions of the franchise agreements "by failing to provide adequate advertising or promotion". Complaint, Count I, ¶ 15 (Appendix A, page A-3).[2]

On May 22, 1985, Respondent counterclaimed against Petitioners, jointly and severally, alleging Petitioners' breach of contract by virtue of Petitioners' failure to pay the franchise royalties and advertising fees required by the franchise agreements. Specifically, Respondent alleged Petitioner Sullivan-Gregory, Inc. had continuously operated the six restaurants as Popeyes franchised restaurants during the delinquency periods, had failed to pay the referenced royalties and fees during said periods, had failed to pay two (2) promissory notes relating to delinquent royalties and fees, and, finally, that Petitioner Sullivan and Petitioner Gregory had failed to honor the terms of each of their joint and several guarantees of timely and full payment of said amounts. Counterclaim, ¶¶ 7-62 (Appendix B, pages B-2 — B-13).

2.

COURSE OF PROCEEDINGS IN THE DISTRICT COURT

The case was tried on March 26, 27 and 30, 1987.

Petitioners' proofs focused upon their subjective dissatisfaction with the timing, character and extent of the advertising undertaken in Petitioners' marketplace by Respondent, in Respondent's capacity as administrator

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[2] Count II of Petitioners' Complaint alleged Respondent tortiously interfered with advantageous contractual and business relationships enjoyed by Petitioners. The District Court granted Respondent's motion for summary judgment with respect to Count II by Memorandum Opinion and Order dated January 20, 1987, and Petitioners did not appeal therefrom.

of the Popeyes' Advertising Fund. Petitioners acknowledged having received advertising support, but not to an extent they deemed adequate or effective.

Respondent established, through its cross examination and examination of witnesses introduced by Petitioners, that various forms of advertising support were, in fact, provided to Petitioners. Furthermore, documentary evidence was introduced, consisting of, *inter alia*, television and radio "buy" sheets, station logs showing "air time", invoices for advertising and various cancelled checks showing payment for such advertising.

When Petitioners rested their case at the end of the third day of trial, Respondent moved to dismiss on the ground that Petitioners had failed to prove any breach of the contract language at issue. Each of the franchise agreements vested Respondent with sole discretion as to the timing and placement of advertising, the agreement specifically providing:

> "... Franchisee, recognizing the value of advertising and the importance of the standardization of advertising and promotion to the goodwill and public image of POPEYES Famous Fried Chicken System, agrees to pay to The POPEYES Famous Fried Chicken Advertising Fund a recurring, non-refundable advertising fund contribution to be paid on a weekly basis, ... of three percent (3%) of the gross sales for the preceding week ..., which sum shall be expended by The POPEYES Famous Fried Chicken Advertising Fund ..., administered for national, regional and local advertising and promotional materials for the POPEYES Famous Fried Chicken System. All reasonable costs incurred by Franchisor ... for the production and dissemination of such advertising and promotional materials may be

> charged to The Advertising Fund . . . . *There shall be no requirement that all or any part of the Fund be disbursed within any accounting period. Selection of medial and locale for media placement shall be at the sole discretion of the Administrator of the Fund.* Franchisee understands that such advertising is intended to maximize the public's awareness of POPEYES Famous Fried Chicken restaurants, and that *Franchisor accordingly undertakes no obligation to insure that any individual franchisee benefits directly or on a pro rata basis from the placement, if any, of such advertising in his local market."* (Emphasis added) Joint Trial Exhibit 3, Franchise Agreement, Article III, ¶ B (Appendix C, pages C-5 – C-6).

The Court granted Respondent's motion, stating that Petitioners had failed to identify any provision of the franchise agreements which had been breached. The Court held the foregoing contract language relating to the payment of advertising fees by Petitioner Sullivan-Gregory, Inc. expressly precluded the kinds of claims advanced in Petitioners' proofs. The Court pointed out said contract language specifically provided there was no requirement monies be spent during any particular accounting period or in any particular franchisee's geographic market. Furthermore, the Court noted that said language contained a disclaimer indicating that Popeyes undertook no obligation to insure that any individual franchisee benefited directly or on a *pro rata* basis from advertising undertaken by the franchisor from the proceeds of advertising-fee payments made by its franchisees. Inasmuch as Petitioners had failed to demonstrate a breach of said contract provisions, the Court concluded Petitioners had failed to present a *prima facie* case.

On the morning of March 31, 1987, Respondent moved for summary judgment, pursuant to Fed R Civ P 56, on its counterclaim for unpaid franchise royalties and advertising fees due under each of the six franchise agreements, maintaining that the admissions contained in Petitioners' answer to the counterclaim, coupled with Petitioners' stipulating to the delinquency amounts recited in joint trial exhibit 184 (Appendix D) and Petitioners' failure to have shown any breach of the contract by Respondent in Petitioners' proofs, precluded the need for additional proofs by Respondent on said counterclaim. Simply stated, Petitioners had admitted utilizing their franchise rights without paying the corresponding weekly royalties and advertising fees required by the franchise agreements. The Court agreed, granting summary judgment in the amounts shown on joint trial exhibit 184 (Appendix D).

On April 3, 1987, the Court entered judgment against Petitioners, jointly and severally, in the amount of Nine Hundred Twenty-Six Thousand Four Hundred Twenty and 79/100 ($926,420.79) Dollars. Said sum represented the cumulative amount of delinquency set forth in stipulated trial Exhibit 184, and consisted of accrued franchise royalties, advertising fees, together with interest thereon, plus amounts due under two defaulted promissory notes (Appendix D).

On May 4, 1987, Petitioners filed a claim of appeal with the United States Court of Appeals for the Sixth Circuit.

3.

PROCEEDINGS IN THE COURT OF APPEALS

In their appeal, Petitioners alleged error both with respect to the dismissal of their complaint and

the grant of summary judgment on Respondent's counterclaim.

In a *per curiam* opinion filed September 9, 1988, the Court of Appeals sustained the trial court's rulings in their entirety. Addressing Petitioners' breach-of-contract allegations relative to lack of advertising support, the Court of Appeals indicated it found no error in the District Court's conclusion that the stated provision of the franchise agreement, leaving to the Advertising Fund Administrator's discretion the timing, selection and placement of advertising, contained no requirement that the Administrator undertake the duty to please individual franchisees, including Petitioner Sullivan-Gregory, Inc., by selecting advertising that specifically benefited a particular market or a particular store. The Court pointed out:

> "SGI did not allege or prove a complete failure by Popeyes to provide advertising and promotional materials; instead, it alleged that Popeyes had provided too little advertising in Detroit and not as much promotional assistance as SGI believed was necessary to give it the help needed." (Petitioners' Appendix C, page C-5).

The Court held that Petitioners' complaint, therefore, was properly dismissed.

Turning to the trial court's grant of summary judgment on Respondent's counterclaim, the Court of Appeals addressed Petitioners' argument that the advertising-fee payment provision of the franchise agreement was "divisible" from the remainder of the agreement. The Court stated it had to first determine, from the nature and language of the contract, the parties' intent in entering into the franchise agreements under

Louisiana law.[3] Because, pursuant to Louisiana law, Petitioner Sullivan-Gregory, Inc.'s several undertakings under the franchise agreements, as well as Popeyes', would be considered as dependent and part of the entire agreement, the Court of Appeals concluded that the trial court had demonstrated no error in construing the franchise agreement to be indivisible and non-executory in nature.

The Court of Appeals also addressed Petitioners' contention the trial court had erred by not properly applying Michigan law, as *lex fori*, on the issue of remedies available to the parties. The Court of Appeals concluded that no principle of Michigan law had been abrogated:

> "Considering the question of damages to be a matter of remedy governed by Michigan law, as that of the forum state, we note that SGI did not contest Popeyes' claim by asserting before the district court that Popeyes had not proved its performance. Rather, SGI claimed that Popeyes was required to establish the amount of actual damages caused by SGI's default in paying the contractual royalties and advertising allowances.
>
> * * *
>
> "The agreements in question indicated the parties' intent that advertising fees (and royalty fees) were to be utilized for the ongoing promotion of the Popeyes system as a whole. They did not provide that advertising and promotion services were first to be performed in the Detroit area before SGI's obligations to pay the fees were

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[3] The franchise agreements contained a choice-of-law clause favoring the law of Louisiana. Joint trial exhibit 3, Article XXIII, ¶ A (Appendix C, page C-43).

> triggered. During the entire period in dispute, SGI was accorded the franchisor's product line, food techniques and formulas, restaurant design and operating procedures, logo, store manuals, and the like. Whether SGI's stores directly received $925,000 worth of Detroit area newspaper, television and other media advertising is not the question; under the franchise agreements, Popeyes was not obligated to allocate SGI's payments to Detroit area advertising. SGI utilized Popeyes' services and name during the period involved, and it has an inter-related, dependent obligation to make the prescribed payments for these services, even though the services were not as extensive or 'helpful' as SGI desired. SGI incidentally acknowledged its ongoing liability from time to time by executing promissory notes representing unpaid and accrued cash obligations. The Michigan authority cited by SGI does not, in our view, support any contrary principles to those expressed herein." (Petitioners' Appendix C, pages C-7 – C-8).

In conclusion, the Court of Appeals succinctly stated:

> " SGI did not repudiate the franchise agreements during the period in dispute. It continued to operate the Popeyes franchise restaurants and continued to receive the benefits of the Popeyes support system. It cannot now complain that Popeyes must prove actual damages rather than the agreed contract fees due and payable arising out of SGI's ongoing breaches." (Petitioners' Appendix C, page C-8).

The Court found no error in the trial court's grant of summary judgment, stating it had viewed the evidence

in the light most favorable to Petitioners but was unable to discern a genuine issue of material fact regarding Petitioners' liability on the contract delinquencies. The trial court's rulings were, accordingly, sustained.

By Order dated November 4, 1988, the Court of Appeals denied Petitioners' petition for rehearing, and by Order dated November 9, 1988, it denied Petitioners' request for rehearing *en banc*.

SUMMARY OF ARGUMENT

This case is not appropriate for review by the United States Supreme Court. This is a breach of contract case which is in the federal courts through diversity jurisdiction. The rulings of the District Court and Court of Appeals are both appropriate and supported by the record. This case does not involve federal questions, and does not present a conflict with decisions of the United States Supreme Court, with Courts of Appeal of any other circuits, nor with the law of the State of Michigan. This case is therefore not similar to the character of cases listed in Supreme Court Rule 17 as having a "special and important" reason for review by the United States Supreme Court.

Petitioners argue that the District Court and Court of Appeals decisions violate their due process rights because there is "no rational basis" for their decisions. This suggested new standard for Supreme Court review has no predicate in reported cases. Furthermore, even if Petitioners' bizarre no-rational-basis-for-decision contention were true, it is well settled that mere judicial error is not a denial of due process.

Petitioners additionally argue that the law of the State of Michigan was not followed, violating this

Court's precepts in *Erie Railroad Co* v *Tompkins*. The record shows, however, that the decision of the District Court is supported by the facts before it, is not contrary to Michigan law and was properly upheld in the Court of Appeals. Petitioners' transparent arguments to the contrary ignore the clear and obvious intent of the judicial decisions at issue.

For all of the foregoing reasons, Respondent submits the petition for writ of certiorari should be denied.

ARGUMENT

I.

REVIEW OF THIS MATTER IS NOT APPROPRIATE UNDER THE STANDARDS OF SUPREME COURT RULE 17.

Supreme Court Rule 17 is manifest that a review on writ of certiorari will not be lightly granted. Review is appropriate "only when there are special and important reasons therefor". The examples cited in Rule 17 portray the character of cases that are considered "special and important". A comparison of these examples with the facts of the instant case demonstrates that the instant case is not one appropriate for review under the standards of Supreme Court Rule 17.

Rule 17 lists five examples of conduct by a federal Court of Appeals which are sufficiently "special and important" to warrant review on writ of certiorari. These are (1) when a federal court of appeals decision conflicts with the decision of another federal court of appeals on the same matter; (2) when a federal court of appeals has decided a federal question in conflict with a state court of last resort; (3) when a federal court of appeals has decided an important question of federal

law which has not been, but should be, settled by the United States Supreme Court; (4) when a federal court of appeals has decided a federal question in a way in conflict with applicable decisions of the United States Supreme Court; and (5) when a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's power of supervision (Rule 17[a]).

The foregoing examples of cases meriting consideration by writ of certiorari evidence that a primary concern of the Supreme Court is the proper and consistent interpretation of federal law. The instant case, however, does not concern the application of federal law. This matter is a breach of contract claim which is in federal court through diversity, not federal question, jurisdiction.

Thus far in the history of these proceedings, no constitutional issues have been involved. Petitioners now attempt to fashion a question which concerns federal law by arguing that the District Court and the Court of Appeals have violated Petitioners' due process rights because there is "no rational basis" for the Courts' decisions. As will be discussed *infra*, Petitioners' contention that the Courts have made erroneous decisions do not raise a federal question.

Petitioners also argue that the District Court and Court of Appeals decisions do not follow the doctrine of *Erie Railroad Co* v *Tompkins*, 304 US 64; 58 S Ct 817; 82 L Ed 1189 (1937). However, Petitioners' argument on this issue is based on a disregard and mischaracterization of the record. As will be discussed *infra*, an examination of the decisions in this matter reveals there is no inconsistency with the law of the State of Michigan and no inconsistency with the *Erie* decision.

The instant case has no similarity to the cases listed by Supreme Court Rule 17 as the type of cases which merit review by the United States Supreme Court. This matter concerns no federal questions, presents no conflict with judicial decisions of this Court or with decisions of the Michigan courts, and is a matter in which the lower federal courts have acted in compliance with the accepted and usual course of judicial proceedings. There is no "special and important" reason for Supreme Court review, and the petition for writ of certiorari should be denied.

II.

THE DECISIONS OF THE DISTRICT COURT AND COURT OF APPEALS DO NOT DEPRIVE PETITIONERS OF DUE PROCESS.

In an attempt to raise some issue worthy of the attention of the United States Supreme Court, Petitioners argue that the decisions of the District Court and the Court of Appeals have violated their due process rights.

In this argument, Petitioners apparently seek to create a standard of appellate review such that in any case, if an appealing party perceives there is no "rational basis" for a lower court's decision, the lower court has violated the appellant's due process rights, and a federal question is raised. Petitioners' suggested new standard of appellate review has no legal predicate. It has been firmly established that mere judicial error does not constitute a denial of due process. In *Bell Telephone Co of Pennsylvania* v *Pennsylvania Public Utility Comm*, 309 US 30; 60 S Ct 388; 84 L Ed 563 (1940), the United States Supreme Court dismissed the petitioner's appeal for want of a substantial federal question. In *Bell Telephone*, a public utility argued that the Utility Commission's rate reduction, and the court's affirmance thereof,

deprived the utility of its property without due process of law because it was arbitrary and without support in the evidence. In dismissing the utility's appeal, this Court stated:

> "it cannot be said that a state court denies due process when in an appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question (citation omitted)." *Id* at 32.

And in *Beck* v *Washington*, 369 US 541; 82 S Ct 955; 8 L Ed 2d 98 (1962), this Court stated:

> "the petitioner's argument here comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . [or] immunity from judicial error . . .' (citations omitted) were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Id* at 554-5.

As will be discussed, there is no error in the decisions of the District Court and the Court of Appeals. However, even if there had been error, previous decisions of this Court confirm that such error does not *per se* amount to a violation of due process. Petitioners' due process argument is without merit.

III.

THE RULE OF *ERIE RAILROAD CO* v *TOMPKINS* HAS NOT BEEN VIOLATED.

Petitioners also argue that the Court of Appeals upheld an award which would not have been granted by a state court in Michigan, and thus did not follow the rule of *Erie* v *Tompkins, supra*. The rule of *Erie* is that in a diversity case, the federal court must follow the law of the state where the federal court sits. *Erie, supra*, at 89-90. However, as is apparent from review of the record, nothing in the decision of either the District Court or the Court of Appeals is contrary to the principles of *Erie*.

Petitioners' argument is that the decision rendered by the District Court would not have been made by a Michigan state court because the decision is at odds with *Mt Ida School for Girls* v *Rood*, 253 Mich 482; 253 NW 227 (1931) and *Walton School of Commerce* v *Stroud*, 248 Mich 85; 226 NW 883 (1929). However, *Rood* and *Stroud* are inapposite because their facts are easily distinguishable from the facts of the instant case. The Court of Appeals expressly addressed, and properly rejected, Petitioners' strained misapplication of *Rood* and *Stroud*.

In *Rood*, the defendant contractually agreed to pay for his daughter's board and tuition at boarding school for a full school year. However, the daughter attended the school only until the Christmas vacation, and thereafter did not return. The Court found that the defendant was not liable for the amount of the full-year contract, stating that "a party to an executory contract may always stop performance by the other party and refuse to perform on his part, and after his refusal he is

liable only upon the breach of the contract." Rood, supra, at 486 (emphasis in original).

In *Stroud,* the defendant entered into an enrollment contract for three courses of instruction with a correspondence school. Defendant received and paid for one course of instruction, but refused to accept the other two courses. The Court found that the defendant had stopped the school's performance of the contract by his own refusal to perform, and thus was not liable for the full contract price of three courses. *Stroud, supra,* at 90.

In the instant case, the Petitioners failed to pay royalty and advertising fees during weeks in which they utilized, and enjoyed the benefits of, their contractual franchise rights accorded them by Respondent. This is unlike *Rood* and *Stroud,* where the defendants did not receive the benefit of any consideration provided by plaintiff.

The District Court found that there was no breach of the contract by Respondent, that the weekly advertising fee payment provisions were an indivisible part of the contract, and that the unpaid franchise and royalty fees were due and owing by Petitioners because the Petitioners had admitted utilizing the franchise system during the period of delinquency. The Court of Appeals affirmed, finding no error in the District Court's construction of the contract.

Petitioners ignore these judicial determinations and seek to revisit the question of the construction of the contract. Petitioners do this by first maintaining that the District Court did not really construe the contract, and second, by arguing that the Court of Appeals did not really affirm the District Court's construction of the contract, but rather fashioned a new category of contracts — that of "nonexecutory" contracts. Both of

these arguments ignore the clear intention of the decisions of the District Court and the Court of Appeals.

Petitioners begin by asserting that the District Court did not construe the contract. However, the record proves the contrary. The oral argument of Respondent's motion to dismiss complaint and Respondent's ensuing motion for summary judgment on its counterclaim reflects that different constructions of the contract were suggested by each party. The construction question before the Court was essentially whether the contract required Petitioners to pay advertising and royalty fees weekly, or whether such payment was also contingent on Respondent's prior or concurrent placement of local advertising.

Respondent maintained that the contract unequivocally provided for payment of franchise royalties of five percent (5%) gross sales and of advertising fees of three percent (3%) gross sales on a weekly basis (Petitioners' Appendix A, page A-2); that the contract clearly provided that failure to pay such indebtedness constituted a breach of the agreement (Petitioners' Appendix A, page A-6); and that the remedy provided by the contract was the amount of the obligation owed plus interest (Petitioners' Appendix A, page A-8).

Petitioners argued that the contract was illusory, one under which nothing was owed by Petitioners until money was paid out by Respondent for local advertising. As argued by Petitioners' counsel: "a logical construction of this would mean it is not due and owing" (Petitioners' Appendix A, page A-10).

The court considered the proofs before it, including the contract and Petitioners' admitted use of franchise rights during the periods of delinquency, and awarded judgment in favor of Respondent in the stipulated

amount of the unpaid royalties and fees (Petitioners' Appendix A, page A-15).

The District Court's remarks clearly express the Court's intent. In awarding the royalties and fees specified by the contract, the District Court construed the contract to require that the weekly franchise royalties and advertising fees be paid during the period of use of the franchise. Petitioners' assertions that the District Court failed to construe the contract ignore the plain intent and inherent logic of the District Court's statements on the record.

Petitioners also argue that the Court of Appeals did not affirm the District Court's construction of the contract but rather fashioned a new category of "nonexecutory" contracts. Petitioners again wholly fail to recognize the intent of the judicial opinion. The District Court had construed the contract to require payment of the franchise royalties and advertising fees on a weekly basis, without regard to any further contingency. Thus, as each week passed, as to the payment of royalties and fees during the period of usage of franchise rights, the franchise agreement was an executed contract, *i.e.*, nothing further was to be performed before the specified sums were due and owing. The Court of Appeals recognized both the import of the District Court's findings in this regard and the difference between the instant contract and the *Rood* and *Stroud* "executory" contracts. Thus, the Court held that "there was no error demonstrated in the District Court's construing the contract to be indivisible and nonexecutory in its nature." (Petitioner's Appendix C, pages C-6–C-7).

Petitioners next argue that Michigan law recognizes only two categories of contracts, "executed" and "executory", and because the Court of Appeals uses the

term "nonexecutory", the Court "fabricated" a new category of contract. However, there is no suggestion in the Court's opinion that it sought to recognize a third category of contracts, or that it wished to depart from the two recognized categories of contracts. In the English language, the prefix "non" means "not", "other than" or "reverse of", *see* Webster's Ninth New Collegiate Dictionary (1983). The Court of Appeals clearly intended "nonexecutory" to be a synonym for "executed". Because Petitioners had, in fact, utilized their franchise rights during the periods of royalty and fee delinquencies, the contract was, to that extent, indeed "executed". Petitioners' strained argument that the Court of Appeals bastardized Michigan contract law ignores the plain thrust of the Court's opinion.

The record verifies that there is factual support for the District Court's construction of the contract, because the contract language expressly provides for the fees to be paid on a weekly basis. The Court of Appeals recognized that there was no error in this factual determination by the District Court (Petitioners' Appendix A, pages C-6, C-7). It is not proper for this Court to reappraise the evidence when there is a basis for the factual determinations made below. *Roemer* v *Board of Public Works of Maryland*, 426 US 736, 756; 96 S Ct 2337; 49 L Ed 2d 17 (1976).

Petitioners have had their day in court on the question of the nature of the contract, and both the District Court and the Court of Appeals held against Petitioners. Petitioners' suggested interpretation of this contract has been soundly rejected. The contract has been properly determined to be unlike the contracts at issue in the *Rood* and *Stroud* cases, and the *Rood* and *Stroud* cases are thus irrelevant to the instant case.

The decisions of the District Court and the Court of Appeals are in accordance with Michigan law. A judicial determination was made, based on the language of the contract, that the advertising and royalty fees were currently due and owing without regard to placement of local advertising by Respondent. The amount awarded to the Respondents was based on the amount of the contractually-specified royalties and fees which Petitioners had not paid in past weeks, as required by the contract, during the periods of their admitted usage of franchise rights. There is nothing in these findings that is contrary to Michigan law, and thus the decisions of the District Court and the Court of Appeals are in accordance with the rule of *Erie*.

Petitioners' final argument is that review by this Court is necessary to correct a situation which will severely impair the ability of the State of Michigan to regulate the business of franchising. Respondent agrees that franchising is an expanding form of business activity, and that it occupies an important place in the commercial world. This fact, however, bears little relationship to the items in dispute here. Regulation of franchising by the State of Michigan has *not* been an issue in this case, either in the trial court or the Court of Appeals.

Supreme Court Rule 17 sets forth the character of cases which are appropriate for review by the United States Supreme Court. Petitioners' argument would add to that rule all cases which are important to commerce. Such an addition is without judicial support or logical merit, and should be disregarded.

CONCLUSION

Petitioners are disappointed with the determination made against them by the lower federal courts in this matter, and have labored to fashion a question of special importance in order to have their arguments heard a third time. Despite Petitioners' efforts, however, the true character of this case is apparent. This case is a contract dispute which involves no question of federal law, involves no constitutional issues, and presents no conflict with decisions of this Court or with decisions of the courts of the State of Michigan. In short, this matter is simply not one in which there are special and important reasons which warrant review by the United States Supreme Court. The petition for writ of certiorari should, therefore, be denied.

Respectfully submitted,

SOTIROFF ABRAMCZYK & RAUSS, P.C.

By: /s/ LAWRENCE R. ABRAMCZYK
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Dated: March 1, 1989

APPENDICES TO BRIEF IN OPPOSITION

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APPENDIX A

COMPLAINT

(Filed March 28, 1985)

(United States District Court —
Eastern District of Michigan — Southern Division)

(WILLIAM F. GREGORY, MICHAEL C. SULLIVAN and SULLIVAN-GREGORY, INC., a Michigan corporation, Plaintiffs, -vs- POPEYE'S FAMOUS FRIED CHICKEN & BISCUITS, INC., formerly known as POPEYE'S FAMOUS FRIED CHICKEN CORPORATION, a Louisiana corporation, Defendant — No. 85CV71383DT)

Now come WILLIAM F. GREGORY, MICHAEL C. SULLIVAN and SULLIVAN-GREGORY, INC., a Michigan corporation, by their attorneys, BARBIER, GOULET, PETERSMARCK, TOLLESON, MEAD & PAIGE, P.C., and for their Complaint against the Defendant state as follows:

COUNT I

BREACH OF CONTRACT

1. That Plaintiff, WILLIAM F. GREGORY, is domiciled in and a resident of the County of Oakland, State of Michigan.

2. That Plaintiff, MICHAEL C. SULLIVAN, is domiciled in and a resident of the County of Oakland, State of Michigan.

3. That Plaintiff, SULLIVAN-GREGORY, INC., is a Michigan corporation, with its principal place of business i. . the County of Oakland, State of Michigan.

4. That Defendant, POPEYE'S FAMOUS FRIED CHICKEN CORPORATION, is a Louisiana corporation, with its principal place of business in the State of Louisiana.

5. This action is of a civil nature involving, exclusive of interest and costs, a sum in excess of $10,000. Every issue of law and fact herein is wholly between citizens of different states.

6. That on or about May 18, 1978, Plaintiffs entered into a Franchise Option Agreement with the Defendant for the purchase of fourteen (14) Popeye's Famous Fried Chicken franchises in a designated area.

7. That said Franchise Option Agreement was amended on April 8th, 1980, December 4th, 1980 and October 22nd, 1981.

8. A copy of said Franchise Option Agreement is attached hereto as Exhibit A.

9. That pursuant to said Franchise Option Agreement, Plaintiffs paid Defendant the sum of FIVE THOUSAND ($5,000.00) DOLLARS for each option, for a total of SIXTY FIVE THOUSAND ($65,000.00) DOLLARS.

10. That pursuant to said Agreement, Plaintiffs paid Defendant an additional sum of FIFTEEN THOUSAND ($15,000.00) DOLLARS for each franchise opened, for a total of NINETY THOUSAND ($90,000.00) DOLLARS.

11. That pursuant to said Franchise Option Agreement, Defendant issued to and entered into a Franchise Agreement with Plaintiff, for franchises as follows:

(a) Troy store — March 30, 1979
(b) Pontiac store — March 3, 1981
(c) Bloomfield Hills store — January 13, 1982
(d) Mt. Clemens store — May 19, 1982
(e) Southfield store — February 4, 1983

(f) Van Dyke store — November 30, 1983.

12. A copy of the Franchise Option Agreement for the Troy store is attached hereto as Exhibit B. The other Franchise Agreements are identical to the Troy store Franchise Agreement.

13. That pursuant to the Franchise Agreements, it was Plaintiffs' obligation to pay a TWENTY THOUSAND ($20,000.00) DOLLAR franchise fee for each franchise, a weekly royalty fee which was five (5%) percent of gross sales for each franchise, and a weekly advertising fund contribution which was three (3%) percent of gross sales for each franchise.

14. That pursuant to said Franchise Agreements, it was Defendant's obligation to provide advertising and promotional programs through the administrator of the Popeye's Fried Chicken Advertising Fund.

15. That Defendant breached the Franchise Agreements by failing to provide adequate advertising or promotion for any of the Michigan franchises.

16. That because of Defendants' breach, Plaintiffs have sustained substantial damages in excess of TEN THOUSAND ($10,000.00) DOLLARS.

WHEREFORE, Plaintiffs request that this Honorable Court enter a judgment in their favor and against the Defendant for whatever amount the Plaintiffs are to be found entitled, including lost profits, together with interest as provided by law, costs and attorneys fees.

COUNT II

TORTIOUS INTERFERENCE WITH ADVANTAGEOUS CONTRACTUAL AND BUSINESS RELATIONSHIP

17. Plaintiffs herein incorporate by reference paragraphs 1 through 16 of their Complaint.

18. That Defendant improperly interferred with its current and prospective contractual relationship with the Plaintiffs by failing to provide adequate advertising or promotion of the Michigan franchises.

19. That Defendant interferred with its current and prospective contractual relationship with the Plaintiffs by permitting and encouraging the failure of three (3) other Michigan franchise operators, thereby degrading and destroying the Popeye concept and image.

20. That although the Franchise Option Agreement granted Plaintiffs fourteen (14) stores, Plaintiffs have been able to establish only six (6) stores.

21. That at the time the parties entered into the Franchise Option Agreement, Defendant knew or should have known that it could not or would not provide the required advertising and promotional support for the Plaintiffs' franchises.

22. That Defendant acted wilfully and intentionally and without just cause.

23. That because of the Defendant's actions, Plaintiffs have incurred substantial damages in excess of TEN THOUSAND ($10,000.00) DOLLARS.

WHEREFORE, Plaintiffs request that this Honorable Court enter a judgment against the Defendant, in whatever amount they are found to be entitled, including puntative damages, together with interest as provided by law, costs and attorney fees.

BARBIER, GOULET, PETERSMARCK,
TOLLESON, MEAD & PAIGE, P.C.
BY: /s/ RALPH W. BARBIER, JR., P10422
JOHN B. CARLIN, JR., P11616
Attorneys for Plaintiffs
34820 Harper Avenue
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APPENDIX B

COUNTERCLAIM

(United States District Court —
Eastern District of Michigan — Southern Division)

(Filed May 22, 1985)

(WILLIAM F. GREGORY, MICHAEL C. SULLIVAN and SULLIVAN-GREGORY, INC., a Michigan Corporation, Plaintiffs, -vs- POPEYE'S FAMOUS FRIED CHICKEN & BISCUITS, INC., formerly known as POPEYE'S FAMOUS FRIED CHICKEN CORPORATION, a Louisiana corporation, Defendant Case No. 85CV71383DT; Hon. George La Plata)

NOW COMES Defendant/Counter-Plaintiff, Popeye's Famous Fried Chicken & Biscuits, Inc. ("Popeyes"), by its attorneys, Donovan Donovan Hammond Ziegelman Roach & Sotiroff, P.C., and Butler Heebe & Hirsch, and counterclaims against Plaintiffs/Counter-Defendants William F. Gregory ("Gregory"), Michael C. Sullivan ("Sullivan") and Sullivan-Gregory, Inc. ("Sullivan-Gregory"), as follows:

1. Popeyes is a corporation incorporated under the laws of the state of Louisiana, domiciled in the Parish of Jefferson, State of Louisiana. Popeyes is the successor corporation to "Popeye's Famous Fried Chicken Corporation", which was likewise a Louisiana corporation, domiciled in the Parish of Jefferson.

2. Upon information and belief, Gregory and Sullivan are individuals, domiciled in the County of Oakland, State of Michigan.

3. Upon information and belief, Sullivan-Gregory is a Michigan corporation, having its principal place of business in the County of Oakland.

4. This Court has jurisdiction of this Counterclaim, because it arises out of the transaction and/or occurrence which is the subject matter of Plaintiffs' Complaint and does not require for its adjudication the presence of any third parties. Furthermore, this Court has jurisdiction pursuant to 28 USC § 1332, because Counter-Plaintiff and Counter-Defendants are of diverse citizenship and the amount in controversy herein exceeds the sum of $10,000.00, exclusive of interest and costs.

5. On or about May 18, 1978, Popeyes, on the one hand, and Gregory, Sullivan and Sullivan-Gregory, on the other, executed a Franchise Option Agreement pursuant to which Counter-Defendants were given an option to construct and operate fourteen (14) stores which would be franchised to sell Counter-Plaintiff's products in accordance with the terms and conditions of said agreement. A copy of the Franchise Option Agreement is attached hereto as Exhibit A and incorporated herein by reference.

6. Thereafter, on or about April 8, 1980; December 10, 1980 and October 22, 1981, the Franchise Option Agreement was amended by the parties. Copies of said Amendments are attached hereto as Exhibits B, C and D, respectively, and incorporated herein by reference.

COUNT I

BREACH OF ROCHESTER ROAD
FRANCHISE AGREEMENT

7. Gregory, Sullivan and Sullivan-Gregory constructed a store at 3130 Rochester Road, Troy, Michigan

for the purpose of commencing a franchised Popeye's Famous Fried Chicken business at that location.

8. As provided in the Franchise Option Agreement, Popeyes (as Franchisor) and Gregory, Sullivan and Sullivan-Gregory (as Franchisee) entered into a Franchise Agreement dated March 30, 1979, which set forth the terms and conditions by which said franchised business was to be conducted. A copy of said Franchise Agreement is attached hereto as Exhibit E and incorporated herein by reference.

9. Gregory, Sullivan and Sullivan-Gregory have continuously operated the Popeye's Famous Fried Chicken franchise located at 3130 Rochester Road, Troy, Michigan, since March 30, 1979.

10. The subject Franchise Agreement requires, *inter alia*, Counter-Defendants to pay Popeyes (i) a weekly royalty of five (5%) percent of the gross sales at said store for the preceding week and (ii) a weekly advertising fund contribution in the amount of three (3%) percent of the gross sales of said store for the preceding week.

11. As of May 14, 1985, Counter-Defendants were delinquent in the payment of One Hundred Forty Four (144) weeks franchise royalties totaling Ninety Eight Thousand Eight Hundred Ninety Nine and 19/100 ($98,899.19) Dollars.

12. As of April 14, 1985, Counter-Defendants were delinquent in the payment of One Hundred Forty Four (144) weeks advertising fund contributions, totaling Fifty Eight Thousand Five Hundred Fourteen and 48/100 ($58,518.48) Dollars.

13. Counter-Defendants' failure to pay the referenced franchise royalties and advertising fund contributions are events of default under the Franchise Agreement.

14. As a result of Counter-Defendants' foregoing breaches of contract, Popeyes has been damaged in the amounts of Ninety Eight Thousand Eight Hundred Ninety Nine and 19/100 ($98,899.18) Dollars and Fifty Eight Thousand Five Hundred Fourteen and 48/100 ($58,514.48) Dollars, respectively.

WHEREFORE, Popeyes prays for judgment in Count I of this Counterclaim against Gregory, Sullivan and Sullivan-Gregory in the amount of One Hundred Fifty Seven Thousand Four Hundred Thirteen and 67/100 ($157,413.67) Dollars, together with its costs and attorney's fees.

COUNT II

BREACH OF EAST BOULEVARD
FRANCHISE AGREEMENT

15. Gregory, Sullivan and Sullivan-Gregory constructed a restaurant at 630 East Boulevard, Pontiac, Michigan for the purpose of commencing a franchised Popeye's Famous Fried Chicken business at that location.

16. As provided in the Franchise Option Agreement, Popeyes (as Franchisor) and Gregory, Sullivan and Sullivan-Gregory (as Franchisee) entered into a Franchise Agreement dated March 3, 1981, setting forth the terms and conditions by which said franchised business was to be conducted. A copy of said Franchise Agreement is attached hereto as Exhibit F and incorporated herein by reference.

17. Gregory, Sullivan and Sullivan-Gregory have continuously operated the Popeye's Famous Fried Chicken franchise located at 630 East Boulevard, Pontiac, Michigan, since March 3, 1981.

18. The subject Franchise Agreement requires, *inter alia*, Counter-Defendants to pay Popeyes (i) a weekly roy-

alty of five (5%) of the gross sales at said store for the preceding week and (ii) a weekly advertising fund contribution in the amount of three (3%) percent of the gross sales of said store for the preceding week.

19. As of May 14, 1985, Counter-Defendants were delinquent in the payment of One Hundred Forty Four (144) weeks franchise royalties totaling Eighty One Thousand Two Seventeen and 37/100 ($81,217.37) Dollars.

20. As of April 14, 1985, Counter-Defendants were delinquent in the payment of Forty Seven Thousand Eight Hundred Forty Seven and 83/100 ($47,847.83) Dollars.

21. Counter-Defendants' failure to pay the referenced franchise royalties and advertising fund contributions are events of default under the Franchise Agreement.

22. As a result of Counter-Defendants' foregoing breaches of contract, Popeyes has been damaged in the amounts of Eighty One Thousand Two Hundred Seventeen and 37/100 ($81,217.37) Dollars and Forty Seven Thousand Eight Hundred Forty Seven and 83/100 ($47,847.83) Dollars, respectively.

WHEREFORE, Popeyes prays for judgment in Count II of this Counterclaim against Gregory, Sullivan and Sullivan-Gregory in the amount of One Hundred Twenty Nine Thousand Sixty Five and 20/100 ($129,065.20) Dollars, together with its costs and attorney's fees.

COUNT III

BREACH OF SOUTH TELEGRAPH
FRANCHISE AGREEMENT

23. Gregory, Sullivan and Sullivan-Gregory, constructed a restaurant at 1995 South Telegraph, West

Bloomfield, Michigan for the purpose of commencing a franchised Popeye's Famous Fried Chicken business at that location.

24. As provided in the Franchise Option Agreement, Popeyes (as Franchisor) and Gregory, Sullivan and Sullivan-Gregory (as Franchisee) entered into a Franchise Agreement dated January 18, 1982, setting forth the terms and conditions by which said franchise business was to be conducted. A copy of said Franchise Agreement is attached hereto as Exhibit G and incorporated herein by reference.

25. Gregory, Sullivan and Sullivan-Gregory have continuously operated the Popeye's Famous Fried Chicken franchise located at 1995 South Telegraph, West Bloomfield, Michigan, since January 13, 1982.

26. The subject Franchise Agreement requires, *inter alia*, Counter-Defendants to pay Popeye's (i) a weekly royalty of five (5%) percent of the gross sales at said store for the preceding week and (ii) a weekly advertising fund contribution in the amount of three (3%) percent of the gross sales of said store for the preceding week.

27. As of May 14, 1985, Counter-Defendants were delinquent in the payment of One Hundred Forty Four (144) weeks franchise royalties totaling Fifty Four Thousand Three Hundred Ninety Three and 77/100 ($54,393.77) Dollars.

28. As of April 14, 1985, Counter-Defendants were delinquent in the payment of Thirty Two Thousand Two Hundred and 94/100 ($32,200.94) Dollars.

29. Counter-Defendants' failure to pay the referenced franchise royalties and advertising fund contributions are events of default under the Franchise Agreement.

30. As a result of Counter-Defendants' foregoing breaches of contract, Popeyes has been damaged in the amounts of Fifty Four Thousand Three Hundred Ninety Three and 77/100 ($54,393.77) Dollars and Thirty Two Thousand Two Hundred and 94/100 ($32,200.94) Dollars, respectively.

WHEREFORE, Popeyes prays for judgment in Count III of this Counteclaim against Gregory, Sullivan and Sullivan-Gregory in the amount of Eighty Six Thousand Five Hundred Ninety Four and 71/100 ($86,594.71) Dollars, together with its costs and attorney's fees.

COUNT IV

BREACH OF SOUTH GRATIOT
FRANCHISE AGREEMENT

31. Gregory, Sullivan and Sullivan-Gregory constructed a restaurant at 1187 South Gratiot, Mount Clemens, Michigan for the purpose of commencing a franchised Popeye's Famous Fried Chicken business at that location.

32. As provided in the Franchise Option Agreement, Popeyes (as Franchisor) and Gregory, Sullivan and Sullivan-Gregory (as Franchisee) entered into a Franchise Agreement dated May 19, 1982, setting forth the terms and conditions by which said franchised business was to be conducted. A copy of said Franchise Agreement is attached hereto as Exhibit H and incorporated herein by reference.

33. Gregory, Sullivan and Sullivan-Gregory have continuously operated the Popeye's Famous Fried Chicken franchise located at 1187 South Gratiot Street, Mount Clemens, Michigan since May 19, 1982.

34. The subject Franchise Agreement requires, *inter*

alia, Counter-Defendants to pay Popeyes (i) a weekly royalty of five (5%) percent of the gross sales at said store for the preceding week and (ii) weekly advertising fund contribution in the amount of three (3%) percent of the gross sales of said store for the preceding week.

35. As of May 14, 1985, Counter-Defendants were delinquent in the payment of One Hundred Forty Four (144) weeks franchise royalties totaling Fifty Six Thousand Fifty Nine and 64/100 ($56,059.64) Dollars.

36. As of April 14, 1985, Counter-Defendants were delinquent in the payment of One Hundred Forty Four (144) weeks advertising fund contributions, totaling Thirty Three Thousand Two Hundred One and 48/100 ($33,201.48) Dollars.

37. Counter-Defendants' failure to pay the referenced franchise royalties and advertising fund contributions are events of default under the Franchise Agreement.

38. As a result of Counter-Defendants' foregoing breaches of contract, Popeyes has been damaged in the amounts of Fifty Six Thousand Fifty Nine and 64/100 ($56,059.64) Dollars and Thirty Three Thousand Two Hundred One and 48/100 ($33,201.48) Dollars, respectively.

WHEREFORE, Popeyes prays for judgment in Count IV of this Counterclaim against Gregory, Sullivan and Sullivan-Gregory in the amount of Eighty Nine Thousand Two Hundred Sixty One and 12/100 ($89,261.12) Dollars, together with its costs and attorney's fees.

COUNT V

BREACH OF GREENFIELD
FRANCHISE AGREEMENT

39. Gregory, Sullivan and Sullivan-Gregory con-

structed a restaurant at 29939 Greenfield, Southfield, Michigan for the purpose of commencing a franchised Popeye's Famous Fried Chicken business at that location.

40. As provided in the Franchise Option Agreement, Popeyes (as Franchisor) and Gregory, Sullivan and Sullivan-Gregory (as Franchisee) entered into a Franchise Agreement dated February 4, 1983, setting forth the terms and conditions by which said franchised business was to be conducted. A copy of said Franchise Agreement is attached hereto as Exhibit I and incorporated herein by reference.

41. Gregory, Sullivan and Sullivan-Gregory have continuously operated the Popeye's Famous Fried Chicken franchise located at 29939 Greenfield, Southfield, Michigan since February 4, 1983.

42. The subject Franchise Agreement requires, *inter alia*, Counter-Defendants to pay Popeyes (i) a weekly royalty of five (5%) percent of the gross sales at said store for the preceding week and (ii) a weekly advertising fund contribution in the amount of three (3%) percent of the gross sales of said store for the preceding week.

43. As of May 14, 1985, Counter-Defendants were delinquent in the payment of One Hundred Forty Four (144) weeks franchise royalties totaling Fifty Thousand Five Hundred Twelve and 29/100 ($50,512.29) Dollars.

44. As of April 14, 1985, Counter-Defendants were delinquent in the payment of One Hundred Forty Four (144) weeks advertising fund contributions, totaling Thirty Thousand Sixty Four and 10/100 ($30,064.10) Dollars.

45. Counter-Defendants' failure to pay the referenced

franchised royalties and advertising fund contributions are events of default under the Franchise Agreement.

46. As a result of Counter-Defendants' foregoing breaches of contract, Popeyes has been damaged in the amounts of Fifty Thousand Five Hundred Twelve and 29/100 ($50,512.29) Dollars and Thirty Thousand Sixty Four and 10/100 ($30,064.10) Dollars, respectively.

WHEREFORE, Popeyes prays for judgment in Count V of this Counterclaim against Gregory, Sullivan and Sullivan-Gregory in the amount of Eighty Thousand Five Hundred Seventy Six and 39/100 ($80,576.39) Dollars, together with its costs and attorney's fees.

COUNT VI

BREACH OF VAN DYKE
FRANCHISE AGREEMENT

47. Gregory, Sullivan and Sullivan-Gregory constructed a restaurant at 45246 Van Dyke, Utica, Michigan for the purpose of commencing a franchised Popeye's Famous Fried Chicken business at that location.

48. As provided in the Franchise Option Agreement, Popeyes (as Franchisor) and Gregory, Sullivan and Sullivan-Gregory (as Franchisee) entered into a Franchise Agreement dated November 30, 1983, setting forth the terms and conditions by which said franchised business was to be conducted. A copy of said Franchise Agreement is attached hereto as Exhibit J and incorporated herein by reference.

49. Gregory, Sullivan and Sullivan-Gregory have continuously operated the Popeye's Famous Fried Chicken franchise located at 45246 Van Dyke, Utica, Michigan since November 30, 1983.

50. The subject Franchise Agreement requires, *inter alia*, Counter-Defendants to pay Popeyes (i) a weekly royalty of five (5%) percent of the gross sales at said store for the preceding week and (ii) a weekly advertising fund contribution in the amount of three (3%) percent of the gross sales of said store for the preceding week.

51. As of May 14, 1985, Counter-Defendants were delinquent in the payment of One Forty Four (144) weeks franchise royalties totaling Twenty Five Thousand Five Hundred Nineteen and 88/100 ($25,519.88) Dollars.

52. As of April 14, 1985, Counter-Defendants were delinquent in the payment of One Hundred Forty Four (144) weeks advertising fund contributions, totaling Fifteen Thousand Three Hundred Thirty and 36/100 ($15,330.36) Dollars.

53. Counter-Defendants' failure to pay the referenced franchise royalties and advertising fund contributions are events of default under the Franchise Agreement.

54. As a result of Counter-Defendants' foregoing breaches of contract, Popeyes has been damaged in the amounts of Twenty Five Thousand Five Hundred Nineteen and 88/100 ($25,519.88) Dollars and Fifteen Thousand Three Hundred Thirty and 36/100 ($15,330.36) Dollars, respectively.

WHEREFORE, Popeyes prays for judgment in Count VI of this Counterclaim against Gregory, Sullivan and Sullivan-Gregory in the amount of Forty Thousand Eight Hundred Fifty and 24/100 ($40,850.24) Dollars, together with its costs and attorney's fees.

COUNT VII

DEFAULT ON PROMISSORY NOTE
(FIRST NOTE)

55. On or about March 4, 1982, Counter-Defendants

Gregory and Sullivan executed and delivered to Popeyes a Promissory Note in the principal amount of Eight Thousand Two and 08/100 ($8,002.08), with interest payable thereon at the rate of thirteen (13%) percent per annum until paid. A copy of said Promissory Note is attached hereto as Exhibit K and incorporated herein by reference.

56. The Promissory Note required Gregory and Sullivan, or either of them, to make payments to Popeyes in the amount of Four Hundred Forty Four and 56/100 ($444.56) Dollars per month for eighteen (18) consecutive months, commencing April 15, 1982.

57. Counter-Defendants Gregory and Sullivan have failed to make the required payments under the Promissory Note.

58. As of April 14, 1985, said Counter-Defendants were delinquent in the payment of Two Thousand Two Hundred Twenty Two and 80/100 ($2,222.80) Dollars.

WHEREFORE, Popeyes prays for judgment in Count VII of this Counterclaim against Gregory and Sullivan in the amount of Two Thousand Two Hundred Twenty Two and 80/100 ($2,222.80) Dollars, together with its costs and attorney's fees.

COUNT VIII

DEFAULT ON PROMISSORY NOTE
(SECOND NOTE)

59. On or about March 4, 1982, Counter-Defendant Gregory executed and delivered to Popeyes a Promissory Note in the principal amount of Thirteen Thousand Three Hundred Thirty Five and 66/100 ($13,335.66) Dollars, with interest thereon at the rate of thirteen (13%) percent per annum until paid. A copy of said Promissory Note is attached hereto as Exhibit L and incorporated herein by reference.

60. Pursuant to the terms of said Promissory Note, Gregory was required to make eighteen (18) monthly payments of Seven Hundred Forty and 87/100 ($740.87) Dollars, commencing April 15, 1982.

61. Counter-Defendant Gregory has failed to make the required payments under the Promissory Note.

62. As of April 14, 1985, Counter-Defendant Gregory was delinquent in the payment of Three Thousand Seven Hundred Four and 35/100 ($3,704.35) Dollars under said Promissory Note.

WHEREFORE, Popeyes prays for judgment in Count VIII of this Counterclaim against Gregory in the amount of Three Thousand Seven Hundred Four and 35/100 ($3,704.35) Dollars, together with its costs and attorney's fees.

DONOVAN HAMMOND ZIEGELMAN
ROACH & SOTIROFF, P.C.
By: Lawrence R. Abramczyk
400 Renaissance Center, Suite 1100
Detroit, Michigan 48243

BUTLER, HEEBE & HIRSCH
By: Aubrey B. Hirsch, Jr.
712 American Bank Building
New Orleans, Louisiana 70130

Attorneys for Defendant and Counter-Plaintiff, Popeye's Famous Fried Chicken & Biscuits, Inc.

Dated: May 21, 1985

APPENDIX C

POPEYES FAMOUS FRIED CHICKEN CORPORATION FRANCHISE AGREEMENT

(Joint Trial Exhibit 3)

THIS AGREEMENT made this *30th* day of *March, 1979* by and between POPEYES Famous Fried Chicken Corporation, a Louisiana corporation with its principal place of business in Metairie, Louisiana (hereinafter referred to as "Franchisor, its subsidiaries, affiliates, parents and related entities) and *WILLIAM F. GREGORY and MICHAEL C. SULLIVAN, SULLIVAN-GREGORY ~~CORPORATION~~ [INC.] JOINTLY and SEVERALLY* (hereinafter referred to as "Franchisee").

WITNESSETH:

WHEREAS, Franchisor, as the result of the expenditure of time, skill, effort, and money has developed and owns a unique system relating to the opening and operating of restaurants specializing in the preparation and sale of highly spiced chicken made with a unique spice and batter formula and other related menu items utilizing confidential food formulas (the "POPEYES Famous Fried Chicken System"), the distinguishing characteristics of which include, without limitation, the name POPEYES Famous Fried Chicken; a unique confidential spice and batter formula used in the preparation of POPEYES Famous Fried Chicken; other confidential food formulas and recipes used in the preparation of other food products; specialized menus; specially designed buildings, interior and exterior layouts, unique trade dress and other identification schemes ("Indicia of Origin"); standards and specifications for equipment, equipment

layouts, products, operating procedures, and management programs, all of which may be changed, improved, and further developed from time to time:

WHEREAS, Franchisor is the owner of the entire right, title and interest in and to the federally registered mark "POPEYES" for restaurant, services, fried chicken, and other related food products and other Indicia of Origin ("Proprietary Marks"), all of which Franchisor has adopted and used to identify the POPEYES Famous Fried Chicken System and continues to develop, use and control the usage of for the benefit and exclusive use of itself and its franchisees in order to identify the POPEYES Famous Fried Chicken System for the public and represent its high standards of quality and services;

WHEREAS, Franchisee wishes to be assisted, trained and licensed by Franchisor as a POPEYES Famous Fried Chicken franchisee and licensed to use in connection therewith the POPEYES Famous Fried Chicken System;

WHEREAS, Franchisee understands the importance to the POPEYES Famous Fried Chicken System of POPEYES high and uniform standards of quality, cleanliness, appearance and service and the necessity of opening and operating Franchisee's POPEYES Famous Fried Chicken franchise in conformity with the POPEYES Famous Fried Chicken System;

NOW THEREFORE, the parties hereto agree as follows:

I.

APPOINTMENT

A. Franchisor hereby grants to Franchisee a franchise to operate a POPEYES Famous Fried Chicken franchise at the location described as *3130 ROCHESTER ROAD, TROY, MICHIGAN*, upon the terms and conditions herein con-

tained and subject to the terms and conditions in an option agreement between Franchisor and Franchisee, dated *May 18, 1978,* which are incorporated herein by reference, and a license to use in connection therewith, Franchisor's Proprietary Marks and the POPEYES Famous Fried Chicken System.

B. During the term of this Franchise Agreement, in addition to the exclusive territory, if any, granted to Franchisee in said option agreement between Franchisor and Franchisee, Franchisor shall not establish, or license others to establish, a POPEYES Famous Fried Chicken restaurant within a circular area having the franchised location granted herein, as its center and having such radius as is necessary to encompass a population of 25,000 (as described in Attachment I hereto) or a radius of one mile, whichever area is smaller, without Franchisee's prior written consent.

II.

DURATION

A. Except as otherwise provided in this Franchise Agreement, the term of this Franchise Agreement shall be for a period of twenty (20) years, which period shall commence from the date of commencement of operation of the POPEYES Famous Fried Chicken franchise granted herein,

B. Franchisee may, at its option, renew this franchise for one (1) additional period of ten (10) years, provided that at the time of renewal:

1. Franchisee gives Franchisor written notice of such election to renew not less than twelve (12) months or more than eighteen (18) months prior to the end of the primary term;

2. Franchisee executes and is obligated to perform under Franchisor's then current standard form of franchise agreement, which may include, without limitation, a higher royalty fee, a higher advertising contribution and a smaller area of geographic exclusivity, if any, than that contained in this Franchise Agreement;

3. Franchisee executes a general release, under seal, of any and all claims against Franchisor;

4. Franchisee is not in default of any provision of this Franchise Agreement, and any amendment hereof or successor hereto, and has fully and faithfully performed all of his obligations throughout the term of this Franchise Agreement;

5. Franchisee has satisfied all monetary obligations owed by Franchisee to Franchisor and its subsidiaries and affiliates and to any Financial Institution, Lender or other entity to whom Franchisor deems himself liable in whole or inpart as Guarantor, Surety or otherwise, and has timely met these obligations throughout the term of this Franchise Agreement;

6. Franchisee agrees to remodel and modernize the franchise unit, including without limitation, interior and exterior design, signs, equipment, furnishing and decor, so as to conform with Franchisor's then current Indicia of Origin, and the standards and specifications for the POPEYES Famous Fried Chicken System, as contained in the then current fran-

chise agreement Confidential Operating Manual, and otherwise in writing;

7. Franchisee shall have paid to Franchisor a renewal fee of fifty percent (50%) of the then current initial franchise fee.

III.

FEES

A. In consideration of the franchise and license granted to Franchisee herein, and the training, assistance and services which have been and will be received by Franchisee, Franchisee shall pay to Franchisor the following:

1. Upon the execution hereof by Franchisee, an initial franchise fee of Twenty Thousand and no/100 Dollars ($20,000). Said initial franchise fee shall be fully earned by Franchisor upon execution of this Franchise Agreement by Franchisee. If an option fee was paid for the franchise granted herein, such fee shall be credited to the initial franchise fee provided for in this Paragraph;

2. During the term of this Franchise Agreement, a recurring, non-refundable royalty fee to be paid on a weekly basis (or such other basis as may be set forth in the Confidential Operating Manual or otherwise in writing) of five percent (5%) of the gross sales for the preceding week (or such other time period as may be set forth in the Confidential Operating Manual or otherwise in writing).

B. In addition to the payments provided for in Paragraph III.A. of this Franchise Agreement, Franchisee,

recognizing the value of advertising and the importance of the standardization of advertising and promotion to the goodwill and public image of the POPEYES Famous Fried Chicken System, agrees to pay to The POPEYES Famous Fried Chicken Advertising Fund a recurring, non-refundable advertising fund contribution to be paid on a weekly basis, (or such other time period as may be set forth in the Confidential Operating Manual or otherwise in writing) of three percent (3%) of the gross sales for the preceeding week (or such other time period as may be set forth in the Confidential Operating Manual or otherwise in writing), which sum shall be expended by the POPEYES Famous Fried Chicken Advertising Fund ("Advertising Fund"), administered for national, regional and local advertising and promotional materials for the POPEYES Famous Fried Chicken System. All reasonable costs incurred by Franchisor or charged to Franchisor by third parties for the production and dissemination of such advertising and promotional materials may be charged to the Advertising Fund. In addition, any costs associated with licensing of the name POPEYES and the characters associated therewith may be charged to The Advertising Fund. The Administrator upon request shall provide Franchisee with an annual accounting of receipts and disbursements of the Fund. There shall be no requirement that all or any part of the Fund be disbursed within any accounting period. Selection of media and locale for media placement shall be at the sole discretion of the Administrator of The Fund. Franchisee understands that such advertising is intended to maximize the public's awareness of POPEYES Famous Fried Chicken restaurants, and that Franchisor accordingly undertakes no obligation to insure that any individual franchisee benefits directly or on a pro rata basis from the placement, if any, of such advertising in his local market.

C. If any monetary obligations owed by Franchisee to Franchisor and its subsidiaries and affiliates are more than seven (7) days overdue (as provided for in the Confidential Operating Manual or otherwise in writing), Franchisee shall, in addition to the obligation, pay to Franchisor a sum equal to one and one-half percent (1½%) of the overdue balance per month, or the highest rate permitted by law, whichever is less.

D. As used herein, "gross sales" shall mean all sales or other income arising from the business franchised herein, less sales tax.

E. Franchisee shall submit the fees provided for in Paragraph III in the manner and at the time prescribed in the Confidential Operating Manual or otherwise in writing.

IV.

ACCOUNTING AND RECORDS

A. Franchisee shall record all sales on a cash register equipped with tapes and utilizing a locked-in grand total mechanism, or any such other equipment as Franchisor may authorize.

B. Franchisee agrees to maintain, during the term of this Franchise Agreement, complete and accurate books, records and accounts in the manner prescribed in the Confidential Operating Manual or otherwise in writing.

C. Franchisee shall submit to Franchisor such forms, reports and records as specified and at the time specified in the Confidential Operating Manual or otherwise in writing.

D. Franchisee shall preserve all books, records, accounts, and tapes for a period of three years, or for

such other time period as may be prescribed in the Confidential Operating Manual or otherwise in writing. Franchisor may reconstruct records from available data in accordance with generally accepted accounting principles and techniques.

E. Franchisor may inspect or may appoint a representative to inspect Franchisee's books, records and accounts at any reasonable time or place (including Franchisee's principal place of business). If such inspection reveals that the gross sales reported by Franchisee to Franchisor are less than the gross sales ascertained by such inspection, then Franchisee shall immediately pay to Franchisor the amount owing to Franchisor, in accordance with the correct gross sales report. Upon discovery of an understatement in the report of gross sales of two percent (2%) or more, Franchisee shall reimburse Franchisor for any and all expenses connected with such inspection, including but not limited to, reasonable accounting and legal fees, as well as interest on the unreported sales at the highest rate permitted by law from the date said payment was due. Such payments shall be without prejudice to any other remedies Franchisor may have under this Franchise Agreement.

V.

PROPRIETARY MARKS

A. It is understood and agreed that this license to use Franchisor's Proprietary Marks applies only to their use in connection with the operation of the franchise licensed in this Franchise Agreement at the location designated herein, and includes only such Proprietary Marks as are now designated as a part of (and which may hereafter be designated in the Confidential Operating Manual or otherwise in writing as part of) the POPEYES

Famous Fried Chicken System, and no other Proprietary Marks of Franchisor now existing or to be developed or acquired by Franchisor.

B. Franchisee expressly acknowledges Franchisor's exclusive right to use the federally registered mark POP-EYES for restaurant services, fried chicken, and other related food products and the other Proprietory Marks, and agrees not to represent in any manner that he has any ownership in Franchisor's Proprietary Marks. Franchisee further agrees that his use of the Proprietary Marks shall not create in his favor any right, title or interest in or to Franchisor's Proprietary Marks, but that all of such use shall inure to the benefit of Franchisor.

C. Franchisee acknowledges that the use of the Proprietary Marks outside the scope of this license, without Franchisor's prior written consent, is an infringement of Franchisor's exclusive right to use the Proprietary Marks, and expressly covenants that during the term of this franchise and after the expiration or termination hereof, that Franchisee shall not, directly or indirectly, commit an act of infringement or contest or aid in contesting the validity or ownership of Franchisor's Proprietary Marks, or take any other action in derogation thereof.

D. Franchisee shall promptly notify Franchisor of any claim, demand, or cause of action based upon or arising from any attempt by any other person, firm or corporation to use the Proprietary Marks licensed hereunder, or any colorable variation thereof, in which Franchisor has or claims a proprietary interest. Franchisee also agrees to notify Franchisor promptly of any litigation instituted by any person, firm, corporation or governmental agency against Franchisor or Franchisee involving Franchisor's Proprietary Marks. Franchisee acknowledges that Franchisor has the right to control any administrative

proceeding or litigation involving the Proprietary Marks. In the event Franchisor undertakes the defense or prosecution of any litigation relating to the Proprietary Marks, Franchisee agrees to execute any and all documents and to do such acts and things as may, in the opinion of counsel for Franchisor, be necessary to carry out such defense or prosecution.

E. Franchisee understands and agrees that its license under said Proprietary Marks is nonexclusive to the extent that Franchisor has and retains the right under this Franchise Agreement:

1. To grant other licenses for the Proprietary Marks, in addition to those licenses already granted to existing franchisees, outside of Franchisee's exclusive territory;

2. To develop and establish other franchise systems for the same, similar, or different products or services utilizing Proprietary Marks not now or hereafter designated as part of the system licensed by this Franchise Agreement, and to grant licenses thereto, without providing Franchisee any right therein;

3. To develop and establish other systems for the sale, at wholesale or retail, of the same, similar, or different products utilizing the same or similar Proprietary Marks, without providing Franchisee any right therein.

F. Franchisee acknowledges and expressly agrees that any and all goodwill associated with the POPEYES Famous Fried Chicken System and identified by the Proprietary Marks used in connection therewith shall inure directly and exclusively to the benefit of Franchisor and

is the property of Franchisor, and that upon the expiration or termination of this Franchise Agreement, no monetary amount shall be assigned as attributable to any goodwill associated with any of Franchisee's activities in the operation of the franchise granted herein, or Franchisee's use of the Proprietary Marks.

G. Franchisee shall not use any Proprietary Marks of Franchisor as part of Franchisee's corporate or other business name, nor shall Franchisee hold out or otherwise employ the Proprietary Marks to perform any activity, or to incur any obligation or indebtedness in such a manner as might, in any way, make Franchisor liable therefor, without Franchisor's prior written consent.

H. Franchisee understands and acknowledges that each and every detail of the POPEYES Famous Fried Chicken System is important to Franchisee, Franchisor and other franchisees in order to develop and maintain high and uniform standards of quality and service, and hence to protect the reputation and goodwill of POPEYES Famous Fried Chicken restaurants. Franchisee accordingly covenants:

1. To operate and advertise under the name "POPEYES Famous Fried Chicken", without prefix or suffix;

2. To adopt and use the Proprietary Marks licensed hereunder solely in the manner prescribed by Franchisor;

3. To observe such reasonable requirements with respect to trademark registration notices as Franchisor may from time to time direct in the Confidential Operating Manual or otherwise in writing;

4. To use, promote and offer for sale only those products and services which are authorized by the Franchisor and meet the standards or specifications prescribed by Franchisor, as those standards or specifications may be disseminated from time to time in the Confidential Operating Manual or otherwise in writing.

I. In order to preserve the validity and integrity of the Proprietary Marks licensed herein and to assure that Franchisee is propely employing the same in the operation of Franchisee's business, Franchisor or its agents shall at all reasonable times have the right to inspect Franchisee's operations, premises and Franchise and make periodic evaluations of the services provided and the products sold and used therein. Franchisee shall cooperate with Franchisor's representative in such inspections and render such assistance to him as he may reasonably request.

VI.

CONFIDENTIAL OPERATING MANUAL

A. In order to protect the reputation and goodwill of the POPEYES Famous Fried Chicken System and to maintain uniform standards of operation under Franchisor's Proprietary Marks, Franchisee shall conduct his business in accordance with the Franchisor's Confidential Operating Manual, a copy of which shall be supplied to Franchisee.

B. Franchisee shall at all times treat the Manual, any other Manuals created for or approved for use in the operation of the franchise granted herein, and the information contained therein as confidential, and shall use all reasonable efforts to maintain such information

secret and confidential. Franchisee shall not at any time, without Franchisor's prior written consent, copy, duplicate, record or otherwise reproduce the foregoing, in whole or in part, nor otherwise make the same available to any unauthorized person or source.

C. The Confidential Operating Manual shall at all times remain the sole property of Franchisor.

D. In order that Franchisee may benefit from new knowledge gained by Franchisor as to improved techniques in the operation of the POPEYES Famous Fried Chicken System, Franchisor may from time to time revise the content of said Manual.

E. Franchisee shall at all times insure that its copy of said Manual is kept current and up-to-date, and in the event of any dispute as to the contents of Franchisee's Manual, the terms of the master copy of the Confidential Operating Manual, maintained by Franchisor at Franchisor's home office, shall be controlling.

VII.

DUTIES OF THE FRANCHISOR

A. Franchisor shall make available to Franchisee, or Franchisee's manager, and two of Franchisee's designated employees Franchisor's training program at a location designated by Franchisor. Franchisee and his two employees shall attend and complete the training program to Franchisor's satisfaction or shall otherwise be determined by Franchisor to be qualified to operate the franchise prior to commencing business. The cost of the training (instruction and required materials) shall be borne by Franchisor. All other expenses during the training period, including costs of accommodations, wages and travel, shall be borne by Franchisee.

B. Franchisor may make available to Franchisee or Franchisee's employees from time to time such additional training programs as Franchisor, in its sole discretion, may choose to conduct. Attendance at said training programs may be mandatory. The cost of the training (instruction and required materials) shall be borne by the Franchisor. All other expenses during the training period, including costs of accommodations, wages and travel, shall be borne by Franchisee.

C. Franchisor may make available such continuing advisory assistance in the operation of the franchise, rendered in person or by bulletins made available from time to time to all franchisees, as Franchisor may deem appropriate.

D. Franchisor at its sole discretion shall provide opening assistance to Franchisee at the franchise premises, for so long and to the extent necessary to accomplish an effective opening.

E. Franchisor shall make available standard plans and specifications to be utilized in the construction of a POPEYES Famous Fried Chicken restaurant. Franchisor shall provide assistance in planning and coordinating the remodeling or renovation of existing units. No modifications of deviations from the standard plans and specifications may be made without the written consent of Franchisor. Franchisee shall obtain, at his own expense, such further qualified architectural and engineering services as may be required to adapt the standard plans and specifications to applicable local or state laws, regulations, or ordinances. Franchisee shall bear the cost of preparing plans containing deviations or modifications from the standard plans.

F. Franchisor shall provide one copy of the Confidential Operating Manual to Franchisee, which contains the

standards, specifications, procedures and techniques of the POPEYES Famous Fried Chicken System, and may revise from time to time the contents of the Manual to incorporate new developments regarding standards, specifications, procedures, and techniques.

G. Franchisor shall provide advertising and promotional programs through the administrator of the POPEYES Famous Fried Chicken Advertising Fund.

H. Franchisor shall continue its efforts to maintain high and uniform standards of quality, cleanliness, appearance and services at all POPEYES Famous Fried Chicken restaurants, thus protecting and enhancing the reputation of POPEYES Famous Fried Chicken and the demand for the products and services of the POPEYES Famous Fried Chicken System, and, to that end, shall establish uniform criteria for approving suppliers, shall make every reasonable effort to disseminate its standards and specifications to prospective suppliers of the Franchisee upon the written request of the Franchisee, except that Franchisor may elect not to make available to prospective suppliers the standards and specifications for such food formulas deemed confidential; and shall conduct periodic inspections of the premises and periodic evaluations of the products used and sold in the franchise granted herein and in all other POPEYES Famous Fried Chicken restaurants.

I. Franchisor shall not, by virtue of any approvals or advice provided to the Franchisee, assume responsibility or liability to Franchisee or any third parties to which it would not otherwise be subject, and Franchisor makes no representations, warranties or guarantees thereby, express or implied, as to the potential volume, profits or success of a POPEYES Famous Fried Chicken franchise constructed or operated at an approved location.

VIII.

DUTIES OF THE FRANCHISEE

The Franchisee understands and acknowledges that every detail of the POPEYES Famous Fried Chicken System is important to Franchisor, to Franchisee, and other franchisees in order to develop and maintain high and uniform operating standards, to increase the demand for POPEYES Famous Fried Chicken products and services and to protect the reputation and goodwill of Franchisor. Franchisee accordingly agrees:

A. To maintain at all times during the term of this Franchise Agreement, at Franchisee's expense, the premises of the franchise, and all fixtures, furnishings, signs and equipment (hereinafter "improvements") thereon in conformity with Franchisor's high standards and public image, and in connection therewith, to make such additions, alterations, repairs and replacements thereto (but no others, without Franchisor's prior written consent) as may be required:

1. To keep the POPEYES Famous Fried Chicken franchise in the highest degree of sanitation and repair, including, without limitation, such periodic repainting, repairs to impaired equipment and replacement of obsolete signs, as Franchisor may reasonably direct;

2. To meet and maintain the highest governmental standards and ratings applicable to the operation of the franchise;

3. To refurbish the franchise upon Franchisor's request, but no more often than once every eight (8) years, to conform the Indicia of Origin to be consistent with Franchisor's then current public image, including, without lim-

itation, such extensive structural changes, remodeling, and redecoration, and such modifications to existing improvements as may be necessary to do so.

B. To operate the franchise in conformity with such uniform methods, standards and specifications as Franchisor may from time to time prescribe in the Confidential Operating Manual or otherwise in writing to insure that the highest degree of quality and service is uniformly maintained; to refrain from any deviation therefrom and from otherwise operating in any manner which reflects adversely on Franchisor's name and goodwill or on the Proprietary Marks associated with the POPEYES Famous Fried Chicken System, and in connection therewith:

1. To maintain in sufficient supply, and use at all times, only such ingredients, products, materials supplies and paper goods as conform with Franchisor's standards and specifications, and to refrain from deviating therefrom by using nonconforming items, without Franchisor's prior written consent;

2. To sell or offer for sale only such products and menu items as meet Franchisor's uniform standards of quality and quantity, as have been expressly approved for sale in writing by Franchisor, and as have been prepared in accordance with Franchisor's methods and techniques for product preparation; to sell or offer to sell all approved items; to refrain from any deviation from Franchisor's standards and specifications for serving or selling the same, without Franchisor's prior written consent; and to discontinue selling or

offering for sale such items as Franchisor may, in its discretion, disapprove in writing at any time;

3. To permit Franchisor or its agents, at any reasonable time, to remove from the franchise premises, at Franchisor's option, certain samples of any ingredients, products, materials, supplies and paper goods used in the operation of the franchise, without payment therefor, in amounts reasonably necessary for testing by Franchisor or an independent, certified laboratory, to determine whether said samples meet Franchisor's then current standards and specifications. In addition to any other remedies it may have under this Franchise Agreement, Franchisor may require Franchisee to bear the cost of such testing if the supplier has not been approved by Franchisor or if the sample fails to conform to Franchisor's specifications;

4. To purchase and install, at Franchisee's expense, all improvements specified in the approved standard site layout and plan, and such others as Franchisor may reasonably direct from time to time in the Confidential Operating Manual or otherwise in writing; and to refrain from installing or permitting to be installed on or about the franchise premises, without Franchisor's prior written consent, any improvements not previously approved as meeting Franchisor's standards and specifications;

5. To permit Franchisor or its representative, without notice, to enter upon the franchise

premises without liability for trespass or other tort, and at Franchisor's option, to remove, replace, repair and/or remodel, at Franchisee's expense, any items which do not conform with Franchisor's then current standards and specifications after Franchisee's delay or refusal upon request promptly to do so; to make such other modifications or alterations as may be necessary to achieve such conformity; and to bill Franchisee for all costs and expenses reasonably incurred in doing so.

C. To purchase all ingredients, products, materials, supplies, paper goods and improvements required for the operation of the franchise solely from suppliers who demonstrate, to the continuing reasonable satisfaction of Franchisor, the ability to meet Franchisor's reasonable standards and specifications for such items; who possess adequate quality controls and capacity to supply Franchisee's needs promptly and reliably; and who have been approved in writing by Franchisor and not thereafter disapproved. If Franchisee desires to purchase any items from an unapproved supplier, Franchisee shall submit to Franchisor a written request for such approval, or shall request the supplier itself to do so. Franchisor shall have the right to require, as a condition of its approval, that its representatives be permitted to inspect the supplier's facilities, and that samples from the supplier be delivered, at Franchisor's option, either to Franchisor or to an independent, certified laboratory designated by Franchisor for testing prior to granting approval. A charge not to exceed the reasonable cost of the inspection and the actual cost of the test shall be paid by the supplier. Franchisor reserves the right, at its option, to reinspect the facilities and products of any such

approved supplier and to revoke its approval upon its failure to continue to meet any of the foregoing criteria.

D. Except as otherwise approved in writing by Franchisor, during the term of this Franchise Agreement, to devote, or have his designated manager devote, full time, energy and best efforts to the management and operation of the franchise granted herein.

E. To require all its employees, as a condition of their employment, to execute an employment agreement, as provided in the Confidential Operating Manual or otherwise in writing, prohibiting them, during the term of their employment or thereafter, from communicating divulging or using for the benefit of any person, persons, partnership, association, or corporation any confidential information, knowledge or know-how concerning the methods of operation of the business franchised hereunder which may be acquired during the term of their employment with Franchisee.

F. To attend, or require Franchisee's designated manager to attend, and require two of Franchisee's designated employees to attend, and successfully complete Franchisor's training program to Franchisor's satisfaction or otherwise be determined by Franchisor to be qualified to operate the franchise, prior to commencing operation of the franchise.

G. If Franchisee operates three or more POPEYES Famous Fried Chicken franchises, to employ a supervisor, who shall meet such standards as may reasonably be imposed by Franchisor in the Confidential Operating Manual or otherwise in writing, for every three stores operated by Franchisee to supervise and coordinate the operation of the franchises. Such supervisor shall be employed upon the commencement of operation of every third franchise unit or multiple thereof.

H. To submit (through the mail, return receipt requested) to Franchisor for its approval prior to use, samples of all promotional and advertising materials to be used by Franchisee that have not been prepared or previously approved by Franchisor. In the event written disapproval of any such materials is not received by Franchisee within thirty (30) days from the date the materials are submitted to Franchisor, said materials shall be deemed approved.

I. To comply with all other requirements set forth in this Franchise Agreement.

IX.

INSURANCE

A. Franchisee shall procure no later than fifteen (15) days before the date on which construction is to begin on the POPEYES Famous Fried Chicken franchise or fifteen (15) days prior to the commencement of operation of the franchise for a building already constructed, and maintain in full force and effect during the entire term of this Franchise Agreement, at the Franchisee's expense, an insurance policy or policies protecting the Franchisee and Franchisor, and their officers, directors, partners and employees against any loss, liability or expense whatsoever from fire, lightning, personal injury, theft, death, malicious mischief, property damage, products liability or otherwise, arising or occurring upon or in connection with the POPEYES Famous Fried Chicken franchise, or by reason of the construction, operation or occupancy of the POPEYES Famous Fried Chicken franchise unit. Franchisor shall be an additional named insured in such policy or policies (statutory policies excepted).

B. Such policy or policies shall be written by an insurance company acceptable to Franchisor, as provided

for in the Confidential Operating Manual, and shall include minimum coverage as set forth in the Confidential Operating Manual or otherwise in writing. Additional coverage and higher policy limits may reasonably be specified for all franchises from time to time by Franchisor in the Confidential Operating Manual or otherwise in writing.

C. Evidence of insurance issued by the insurance company showing compliance with the foregoing requirements shall be furnished by Franchisee to Franchisor no later than the date insurance is to be procured in accordance with Paragraph IX.A. of this Franchise Agreement and annually thereafter. The evidence of insurance shall include a statement that the policy or policies may not be cancelled or altered without at least thirty (30) days prior written notice to Franchisor.

D. Maintenance of insurance and the performance by Franchisee of the obligations under this Paragraph IX shall not relieve the Franchisee of liability under the indemnity provisions set forth in Paragraph XVI.B. of this Franchise Agreement.

E. Should Franchisee, for any reason, not procure and maintain the insurance coverage required by this Franchise Agreement and the Confidential Operating Manual, then Franchisor shall have the right and authority (without, however, any obligation to do so) immediately to procure such insurance coverage and charge same to Franchisee, which charges, together with the fee of One Hundred Dollars ($100.00) for expenses incurred by Franchisor in connection with such procurement, shall be payable by Franchisee immediately upon notice.

X.

CONFIDENTIAL INFORMATION

Franchisee shall not during the term of this Franchise Agreement or thereafter, communicate, divulge, or use for the benefit of any other person, persons, partnership, association or corporation any confidential information, knowledge, or know-how concerning the construction and methods of operation of the business franchised hereunder which may be communicated to Franchisee, or of which Franchisee may be apprised, by virtue of Franchisee's operation under the terms of this Franchise Agreement. Franchisee shall divulge such confidential information only to such employees as must have access to it in order to operate the franchise granted herein. Any and all information, knowledge and know-how, including, without limitation, drawings, materials, equipment, recipes, and other data, which Franchisor designates as confidential shall be deemed confidential for purposes of this Franchise Agreement, except information which Franchisee can demonstrate came to its attention prior to disclosure thereof by Franchisor; or which, at the time of disclosure by Franchisor to Franchisee, has become a part of the public domain, through publication or communication by others; or which, after disclosure to Franchisee by Franchisor, becomes a part of the public domain, through publication or communication by others.

XI.

IN-TERM COVENANTS

Franchisee covenants that, except as otherwise approved in writing by Franchisor, during the term of this Franchise Agreement, Franchisee (who, unless otherwise specified, shall include for purposes of this Para-

graph XI collectively and individually, all officers, directors and holders of a beneficial interest of five percent (5%) or more of the securities with voting rights of Franchisee and of any corporation, directly or indirectly, controlling Franchisee, if Franchisee is a corporation, and the general partners and any limited partner, including any corporation and the officers, directors and holders of a beneficial interest of five percent (5%) or more of securities with voting rights, of a corporation which controls, directly or indirectly any general or limited partner, if Franchisee is a partnership) shall not, either directly or indirectly, for himself or through, on behalf of, or in conjunction with any person, persons, partnership, or corporation:

1. Divert or attempt to divert any business or any customer of the business franchised hereunder to any competitor by direct or indirect inducements or otherwise;

2. Employ or seek to employ any person who is at that time employed by Franchisor or by any other POPEYES Famous Fried Chicken franchisee, or to otherwise, directly or indirectly, induce such person to leave his or her employment thereat;

3. Own, maintain, engage in, or have a controlling interest in any business offering the same or similar products or services as offered by Franchisee under this Franchise Agreement within a radius of five (5) miles of the location granted herein or within a radius of five (5) miles of any POPEYES Famous Fried Chicken restaurant; provided however, that this provision shall not apply to the operation by Franchisor of any POPEYES

Famous Fried Chicken franchise which may be granted by Franchisor to Franchisee.

XII.

TRANSFERABILITY OF INTEREST

A. This Agreement shall inure to the benefit of the successors and assigns of Franchisor. Franchisor shall have the right to transfer or assign its interest in this Franchise Agreement to any person, persons, partnership, association or corporation. If Franchisor's assignee assumes all obligations of Franchisor hereunder, and sends written notice of the assignment so attesting, Franchisee agrees promptly to execute a release of Franchisor, except for any known liabilities incurred by Franchisor prior to the date of such notice, and Franchisor shall not thereafter be under any further obligation under this Franchise Agreement.

B. Franchisee understands and acknowledges that the rights and duties set forth in this Franchise Agreement are personal to Franchisee, and that Franchisor has granted this franchise in reliance on Franchisee's business skill and financial capacity. Franchisee shall not, without Franchisor's prior written consent, sell, assign, transfer, convey, give away, pledge, mortgage, or otherwise encumber any interest in this Franchise Agreement, or any interest in Franchisee, nor offer, permit or suffer the same. Unless otherwise specified, the term Franchisee as used in this section, shall include collectively and individually, all officers, directors, and holders of a beneficial interest of five percent (5%) or more of the securities with voting rights of Franchisee, and of any corporation directly or indirectly controlling Franchisee, if Franchisee is a corporation, and the general partners and any limited partner (including any corpora-

tion and the officers, directors and holders of a beneficial interest of five percent (5%) or more of securities with voting rights, or a corporation which controls, directly or indirectly any general or limited partner), if Franchisee is a partnership. Any purported assignment or transfer, by operation of law or otherwise, not having the written consent of Franchisor shall be null and void and shall constitute a default which is good cause for immediate termination of this Franchise Agreement.

C. Franchisor shall not unreasonably withhold its consent to any transfer referred to in Paragraph XII.B. of this Franchise Agreement for the remainder of the term hereof, when requested; provided, however, that prior to the time of transfer:

1. All of Franchisee's accrued monetary obligations to Franchisor and its subsidiaries and affiliates and to any Financial institution, lender or other entity to whom Franchisor deems himself liable in whole or in part as a Guarantor, Surety or otherwise shall have been satisfied;

2. Franchisee shall have:

   a. Executed a general release under seal, in a form satisfactory to Franchisor, of any and all claims against Franchisor;

   b. Agreed to remain obligated under the covenants contained in Paragraphs X and XIV of this Franchise Agreement as if this Franchise Agreement had been terminated on the date of the transfer;

   c. Executed a written agreement, under seal, in a form satisfactory to Franchisor, in which Franchisee covenants to remain

primarily liable under this Franchise Agreement and to waive notice of demand, presentment, protest and dishonor, which liability shall not be affected by any extension of time, credit or other indulgence granted to any transferee Franchisee.

3. The transferee Franchisee shall have:

   a. Met Franchisor's then current criteria for new franchisees;

   b. Executed a written assignment, under seal, in a form satisfactory to Franchisor, pursuant to which the transferee Franchisee shall assume all of the obligations of the individual or entity which is the transferor Franchisee under this Franchise Agreement.

4. A transfer fee not to exceed Two Thousand Dollars ($2,000.00) shall have been paid in full to Franchisor to cover Franchisor's administrative expenses in connection with the transfer, but no initial franchise fee or other fee shall be charged by Franchisor for a transfer. If the transferee Franchisee is a corporation formed by Franchisee for the convenience of ownership, no transfer fee shall be required.

5. Franchisee and the transferee Franchisee shall have met all of the applicable additional requirements set forth in the remainder of this Paragraph XII.

D. If a transfer, alone or together with other related previous, simultaneous, or proposed transfers, would

have the effect of transfering control of the business franchised hereinto a transferee Franchisee, Franchisor's consent to the transfer shall be conditioned on the following requirements:

1. The transferee Franchisee shall be of good moral character and reputation in the judgment of Franchisor.

2. The transferee Franchisee shall have demonstrated to Franchisor's satisfaction, by meeting with Franchisor or otherwise, at Franchisor's option, that the transferee Franchisee's qualifications meet Franchisor's then current criteria for a new franchisee. For the purposes of determining whether the conditions herein have been met, the persons and entities included in the term Franchisee as defined for use in this Paragraph XII, shall be considered collectively;

3. The transferee Franchisee shall execute the then current standard form of Franchise Agreement (and such other then current ancillary agreements as Franchisor may reasonably require) which shall expire on the date of expiration of this Franchise Agreement;

4. The transferee Franchisee and such other individuals as shall be designated by Franchisor in the Confidential Operating Manual or otherwise in writing shall have successfully completed the training course then in effect for franchises;

5. The other requirements of paragraph XII.C. of this Franchise Agreement shall have been met;

6. If the transferee Franchisee is a corporation:

   a. The corporate transferee Franchisee shall promptly furnish Franchisor on a regular basis with certified copies of such corporate records material to the franchised business as Franchisor may require from time to time in the Confidential Operating Manual or otherwise in writing:

   b. Each stock certificate of the corporate transferee Franchisee representing each share of stock the transfer of which is restricted by this Franchise Agreement, shall have conspicuously endorsed upon it a statement that it is held subject to all restrictions imposed upon assignments in this Franchise Agreement.

7. If the transferee Franchise is a partnership, the partnership agreement shall provide that further assignments or transfer of any interest in the partnership is subject to all restrictions imposed upon assignments in this Franchise Agreement.

E. In the event of the death or permanent incapacity of any individual who controls Franchisee, directly or indirectly, Franchisor shall not unreasonably withhold its consent to a transfer to any person, persons, partnership or corporation designated by his legal representative, provided, however, that:

1. The requirements of Paragraph XII.C. and XII.D. of this Franchise Agreement shall have been met;

2. The proposed transfer is applied for in writing within two (2) months of the date of death or permanent incapacity by the legal representative of such individual, and is effected within six (6) months thereafter;

3. In the case of permanent incapacity, the legal representative shall have furnished a certificate of a physician designated by Franchisor that Franchisee has been or will be unable to operate the franchise for a period of six (6) months or longer.

F. Franchisor's consent to a transfer of this franchise shall not constitute a waiver of any claims it may have against the transferor Franchisee, nor shall it be deemed a waiver of Franchisor's right to demand exact compliance with any of the terms of this Franchise Agreement by the transferee Franchisee.

G. If Franchisee has received and desires to accept a signed, bona fide offer from any third party to purchase Franchisee or any interest in Franchisee, Franchisee shall notify Franchisor in writing of each such offer, and Franchisor shall have the right and option, exercisable within thirty (30) days after actual receipt of such written notification or receipt of evidence of merchantable title, whichever is later, to give notice to Franchisee that Franchisor intends to purchase Franchisee's franchise or interest therein on the same terms and conditions offered by the third party, and closing shall be within sixty (60) days of Franchisor's notice of the exercise of its option. (Franchisee shall provide Franchisor with such verification of the terms of the offer as Franchisor may require). Should Franchisor fail to exercise this option and the terms of the offer go unaccepted and thereafter be altered, or should the transaction not

be consummated and closed within one (1) month with the same third party, Franchisor shall, in each instance, be notified in writing of terms of the offer and shall again have thirty (30) days from the date of actual receipt thereof, or from receipt of evidence of merchantable title, whichever is later, to notify Franchisee that it intends to purchase on such terms. Should Franchisor fail to exercise this option, the terms of Paragraph XII of the Franchise Agreement shall govern any transfer which may be contemplated.

XIII.

TERMINATION

A. Except as provided in Paragraph XIII.B. and C. of this Franchise Agreement, Franchisee shall have thirty (30) days after receipt from Franchisor of a written Notice to Cure within which to remedy any default hereunder. If any such default is not cured within that time, or such longer period as applicable law may require, Franchisor may, at its option, terminate this Franchise Agreement, and all rights granted hereunder effective immediately upon receipt by Franchisee of a written Notice of Termination. Franchisee shall be in deault hereunder for any failure substantially to comply with any of the requirements imposed by this Franchise Agreement, as it may from time to time reasonably be supplemented by the Confidential Operating Manual or otherwise in writing, or to carry out the terms of the Franchise Agreement in good faith, including, without limitation, any of the following events:

1. If Franchisee fails or refuses promptly to pay any monies owing to Franchisor or its subsidiaries or affiliates and to any Financial institution, lender or other entity to whom

Franchisor deems himself liable in whole or in part as a Guarantor, Surety or otherwise on date due;

2. If Franchisee fails or refuses to submit the financial information that Franchisor requires in this Franchise Agreement, or makes any false statements in connection therewith;

3. If Franchisee fails to maintain the standards that Franchisor requires in this Franchise Agreement;

4. If Franchisee, by act or omission, suffers a continued violation, in connection with the operation of the franchise, of any law, ordinance, rule or regulation of a government agency, in the absence of a good faith dispute over its application or legality and without promptly resorting to an appropriate administrative or judicial forum for resolution thereof.

B. Franchisee shall be deemed to be in default and Franchisor shall terminate this Franchise Agreement and all rights granted hereunder effective immediately without notice or opportunity to cure (except as otherwise required by law), if Franchisee shall become insolvent or make a general assignment for the benefit of creditors, or if a petition in bankruptcy is filed by Franchisee, or such a petition is filed against and consented to by Franchisee, or if Franchisee is adjudicated a bankrupt, or if a bill in equity or other proceeding for the appointment of a receiver of Franchisee or other custodian for Franchisee's business or assets is filed and consented to by Franchisee, or if a receiver or other custodian (permanent or temporary) of Franchisee's assets or property, or any part hereof, is appointed by any

court of competent jurisdiction, or if proceedings for a composition with creditors under any state or federal law should be instituted by or against Franchisee, or if a final judgment remains unsatisfied or of record for thirty (30) days or longer (unless supersedeas bond is filed), or if execution is levied against Franchisee's franchise or property, or a suit to foreclose any lien or mortgage against the premises or equipment is instituted against Franchisee and not dismissed within thirty (30) days, or if the real or personal property of Franchisee's franchise shall be sold after levy thereupon by any sheriff, marshall, or constable.

C. Franchisee shall be deemed to be in default and Franchisor may, at its option, terminate this Agreement and all rights granted hereunder effective immediately, without notice or prior opportunity to cure the default (except as otherwise required by law), upon the occurrence of any of the following events:

1. If Franchisee has received from Franchisor two (2) or more Notices to Cure pursuant to paragraph XIII.A. of this Franchise Agreement for the same, similar or different defaults in the same calendar year, in which event a Notice of Termination may be sent in lieu of any subsequent Notice to Cure;

2. If Franchisee transfers any rights or obligations arising from this Franchise Agreement to any third party without Franchisor's prior written consent, contrary to the prosciptions in Paragraph XII.B. of this Franchise Agreement.

3. If Franchisee ceases to do business at the location granted in this Franchise Agreement, or fails within thirty (30) days to remedy any

material default under any lease or sublease for the franchise premises, or loses the right to possession of the premises or otherwise forfeits the right to do or transact business in the jurisdiction where the franchise is located, provided, however that if any such loss of possession results through no fault of Franchisee, and the premises are damaged or destroyed by a disaster such that they cannot, in Franchisor's judgment, reasonably be restored, then this Franchise Agreement shall not be terminated for that reason for sixty (60) days thereafter, provided Franchisee applies within that time for the approval of Franchisor to relocate, for the remainder of the term hereof, to other premises, which approval shall not be unreasonably withheld.

XIV.

EFFECT OF TERMINATION OR EXPIRATION

A. Upon termination or expiration of this Franchise Agreement, Franchisee shall immediately cease to be a POPEYES Famous Fried Chicken franchisee and:

1. Franchisee shall immediately cease to operate the restaurant as a POPEYES Famous Fried Chicken restaurant, and shall not thereafter, directly or indirectly, represent to the public that the restaurant is a POPEYES Famous Fried Chicken restaurant, or hold itself out as a present or former franchisee of Franchisor;

2. Franchisee shall immediately cease to use, by advertising or in any manner whatsoever: any menus, recipes, confidential food for-

mulas, equipment, methods, procedures and techniques associated with the POPEYES Famous Fried Chicken System in which Franchisor has a proprietary right, title or interest, the name POPEYES Famous Fried Chicken, and any Proprietary Marks and Indicia of Origin associated with the POPEYES Famous Fried Chicken System. In particular, Franchisee shall cease to use, without limitation all signs, furniture, fixtures, equipment, advertising materials, stationery, forms and any other articles which display the Proprietary Marks of Indicia of Origin associated with the POPEYES Famous Fried Chicken System.

3. Franchisee agrees, in the event it continues to operate or subsequently begins to operate a restaurant or other business, not to use any reproduction, counterfeit, copy or colorable imitation of the Proprietary Marks in conjunction with such other business which is likely to cause confusion or mistake or to deceive, and further agrees not to utilize any trade dress or designation of origin or description or representation which falsely suggests or represents an association or connection with Franchisor, so as to constitute unfair competition. Franchisee shall make such modifications or alterations to the franchise premises immediately upon termination or expiration of the franchise herein granted as may be necessary to prevent the operation of any business thereon by himself or others in derogation of this Paragraph, and shall make

such specific additional changes thereto as Franchisor may reasonably request for that purpose.

4. Franchisee shall immediately pay all sums owing to Franchisor and its subsidiaries and affiliates. In the event of termination for any default by Franchisee, such sums shall include all damages, costs and expenses, including reasonable attorney's fees, incurred by Franchisor as a result of the default, which obligation shall give rise to and remain, until paid in full, a lien in favor of Franchisor against any and all of the personal property, equipment, and fixtures owned by Franchisee and on the franchise premises at the time of default.

5. Franchisee shall pay to Franchisor all damages, costs and expenses, including reasonable attorney's fees, incurred by Franchisor subsequent to the termination or expiration of the franchise herein granted in obtaining injunctive relief for the enforcement of any portion of this Paragraph XIV of the Franchise Agreement.

6. Franchisee shall immediately turn over to Franchisor all manuals, records, files, instructions, correspondence, and any and all other materials relating to the operation of the franchise in Franchisee's possession and all copies thereof (all of which are acknowledged to be Franchisor's property) and shall retain no copy or record of any of the foregoing, excepting only Franchisee's copy of the agreements between Franchisor and Franchisee, any corre-

spondence between the parties, and any other documents which Franchisee reasonably needs for compliance with any provision of law.

B. Franchisor shall have the right (but not the duty), to be exercised by notice of intent to do so within thirty (30) days after termination or expiration, to purchase any and all improvements, advertising material, ingredients, products, materials, supplies, paper goods and any items bearing Franchisor's Proprietary Mark at Franchisee's cost or fair market value, whichever is less. If the parties cannot agree on fair market value within a reasonable time, an independent appraiser shall be designated by Franchisor and his determination shall be binding. If Franchisor elects to exercise any option to purchase herein provided, it shall have the right to set-off all amounts due from Franchisee under this Franchise Agreement and the cost of the appraisal, if any, against any payment therefor.

C. Franchisee covenants that, except as otherwise approved in writing by the Franchisor, for a period of one (1) year after expiration or termination of this Franchise Agreement, regardless of the cause of termination, Franchisee (who, unless otherwise specified, shall include for purposes of this Paragraph XIV.C., collectively and individually, all officers, directors or holders of a beneficial interest five (5%) percent or more of the securities with voting rights of Franchisee and of any corporation directly or indirectly controlling Franchisee, if franchisee is a corporation, and the general partners and any limited partner (including any corporation and the officers, directors and holders of a beneficial interest of five (5%) percent or more of securities with voting rights of a corporation which controls, directly or indirectly, any general or limited partner), if Franchisee is a partnership, shall not for himself, or through, on behalf

of, or in conjunction with any other persons, partnership or corporation:

1. Divert or attempt to divert any business or any customer of the business franchised hereunder to any competitor by direct or indirect inducements or otherwise;

2. Employ or seek to employ any person who is at that time employed by Franchisor or by any other POPEYES Famous Fried Chicken franchisee, or to otherwise directly or indirectly induce such person to leave his or her employment htereat;

3. Own, maintain, engage in, or have a controlling interest in any business offering the same or similar products or services as offered by Franchisee under this Franchise Agreement with in a radius of five (5) miles of the location granted herein or within a radius of five (5) miles of any POPEYES Famous Fried Chicken restaurant; provided however, that this provision shall not apply to the operation by Franchisee of any POPEYES Famous Fried Chicken franchise which may be granted by Franchisor to Franchisee.

D. Franchisee shall comply with the provisions of Paragraph X of this Franchise Agreement.

XV.

TAXES, PERMITS AND INDEBTEDNESS

A. Franchisee shall promptly pay when due all taxes and all accounts and other indebtedness of every kind incurred by Franchisee in the conduct of the franchise granted under this Franchise Agreement.

B. Franchisee shall comply with all federal, state, and local laws and regulations and shall timely obtain any and all permits, certificates, or licenses necessary for the full and proper conduct of the franchise granted under this Franchise Agreement.

XVI.

INDEPENDENT CONTRACTORS AND INDEMNIFICATION

A. This Franchise Agreement does not constitute Franchisee an agent, legal representative, joint venturer, partner, employee, or servant of Franchisor for any purpose whatsoever; and it is understood and agreed that Franchisee shall be an independent contractor and is in no way authorized to make any contract, agreement, warranty or representation on behalf of Franchisor, or to create any obligation, express or implied, on behalf of Franchisor. The parties further agree that this Franchise Agreement does not create a fiduciary relationship between them.

B. Under no circumstances shall Franchisor be liable for any act, omission, contract, debt or any other obligation of Franchisee. Franchisee shall indemnify and hold Franchisor harmless against any such claim and the cost (including attorney's fees) of defending against such claims arising directly or indirectly from, or as a result of, or in connection with, Franchisee's operation of the franchise.

XVII.

EFFECT OF WAIVER

No failure of Franchisor to exercise any power reserved to it in this Franchise Agreement, or to insist upon compliance by Franchisee with any obligation or condition in this Franchise Agreement, and no custom or practice

of the parties at variance with the terms hereof, shall constitute a waiver of Franchisor's right to demand exact compliance with the terms of this Franchise Agreement. Waiver by Franchisor of any particular default by Franchisee shall not affect or impair Franchisor's right in respect to any subsequent default of the same or of a different nature nor shall any delay, forbearance, or omission of Franchisor to exercise any power or rights arising out of any breach or default by Franchisee of any of the terms, provisions, or covenants of this Agreement, affect or impair Franchisor's right, nor shall such constitute a waiver by Franchisor of any rights hereunder or right to declare any subsequent breach or default. Subsequent acceptance by Franchisor of any payments due to it shall not be deemed to be a waiver by Franchisor of any preceding breach by Franchisee of any terms, covenants, or conditions of this Franchise Agreement.

XVIII.

NOTICES

Any notices required hereunder shall be in writing and shall be sent by personal delivery, or by certified or registered mail, return receipt requested, if directed to Franchisor addressed to POPEYES Famous Fried Chicken Corporation, Attention: Franchise Department, 1405 Airline Highway, Metairie, Louisiana, 70001, or to such other address as Franchisor may designate, and if directed to Franchisee, addressed to Franchisee at the address shown on the first page or the latest current address of which Franchisor has been notified. Payments required to be made hereunder shall be made by personal delivery of by mail, postage prepaid, and addressed to Franchisor as provided in this Paragraph. Notice by mail shall be deemed given and received not later than the seventh (7th) business day following the date same was deposited in the mail, duly addressed and posted.

XIX.

SEVERABILITY AND CONSTRUCTION

A. Except as expressly provided to the contrary herein, each section, part, term and/or provision of this Franchise Agreement shall be considered severable; and if, for any reason, any section, part, term and/or provision herein is determined to be invalid and contrary to, or in conflict with, any existing or future law or regulation of a court or agency having valid jurisdiction, such shall not impair the operation or affect the remaining portions, sections, parts, terms and/or provisions of this Franchise Agreement, and the latter will continue to be given full force and effect and bind the parties hereto; and such invalid sections, parts, terms and/or provisions shall be deemed not to be part of this Franchise Agreement.

B. Franchisee expressly agrees to be bound by any promise or covenant imposing the maximum duty permitted by law which is subsumed within the terms of any provision hereof, as though it were separately articulated in and made a part of this Franchise Agreement, that may result from striking from any of the provisions contained herein any portion or portions which a court may hold to be unreasonable and unenforceable in a final decision to which Franchisor is a party, or from reducing the scope of any covenant to the minimum extent required to comply with such a court order.

XX.

ENTIRE AGREEMENT

This Franchise Agreement, the documents referred to herein, the Option Agreement, if any, and the attachments attached hereto, constitute the entire, full and

complete agreement between Franchisor and Franchisee concerning the subject matter hereof, and supersede all prior agreements. No other representations have induced Franchisee to execute this Franchise Agreement, and there are no representations, inducements, promises or agreements, oral or otherwise, between the parties not embodied herein which are of any force or effect with reference to this Franchise Agreement or otherwise. No amendment, change or variance from this Franchise Agreement shall be binding on either party unless executed in writing.

XXI.

CAPTIONS

The captions to each paragraph herein are used for convenience only and shall not be considered part of this Franchise Agreement nor used in interpreting the provisions hereof.

XXII.

DISCLAIMER

Franchisee acknowledges that it has conducted an independent investigation of the POPEYES Famous Fried Chicken franchise and recognized that the business venture contemplated by this Franchise Agreement involves business risks and will be largely dependent upon the ability of the Franchisee as an independent businessman. Franchisor expressly disclaims the making of, and Franchisee acknowledges that is has not received, any warranty or guarantee, expressed or implied, as to the potential volume, profits or success of the business venture contemplated by this Franchise Agreement.

XXIII.

APPLICABLE LAW

A. This Franchise Agreement shall be interpreted and construed under the laws of the State of Louisiana, which laws shall prevail in the event of any conflict of laws.

B. No right or remedy herein conferred upon or reserved to Franchisor is exclusive of any other right or remedy herein or by law or equity provided or permitted; but each shall be cumulative of any other right or remedy provided in this Franchise Agreement.

XXIV.

CORPORATE FRANCHISEE

In the event the Franchisee named herein is a corporation at the time of execution of this Franchise Agreement, it is warranted, covenanted and represented to Franchisor that, if Franchisee is privately held, all of the issued and outstanding stock, or if Franchisee is publicly held, a plurality of the issued and outstanding stock sufficient to confer the power and authority to effect actual control of the corporation, is and shall be owned by and issued to the following person or persons: *WILLIAM F. GREGORY and MICHAEL C. SULLIVAN, SULLIVAN-GREGORY* ~~*CORPORATION*~~ [*INC.*], *JOINTLY and SEVERALLY* at all times during the term of this Franchise Agreement and that:

A. The above named person or persons has individually and jointly and severally executed this Franchise Agreement, and such person, or one of such persons, is and shall be the chief executive officer of the Franchisee corporation, if it is privately held, or does and shall hold such corporate office or offices as may be necessary to

maintain and exercise the actual power and authority actively to direct the affairs of the Franchisee corporation, if it is publicly held, at all times during the term of this Franchise Agreement:

B. The requirements of Paragraph V of this Franchise Agreement prohibiting the use of Franchisor's Proprietary Marks in Franchisee's corporate or other business name shall be met at all times during the term of this Franchise Agreement.

C. The requirements of Paragraph XII.D.6. of this Franchise Agreement have been and shall be met, during the term of the Agreement, as if the franchise granted herein had been transferred to the Franchise corporation by some other franchisee.

D. Franchisee is incorporated in the State of *MICHIGAN* and has its principal place of business at, ~~*7365 ORCHARD LAKE ROAD, WESTBLOOMFIELD, MICHIGAN 48003*~~ [*3130 ROCHESTER ROAD, TROY, MICHIGAN 48084*] and shall promptly notify Franchisor in writing of any change thereto during the term of this Franchise Agreement.

IN WITNESS WHEREOF, the parties hereto, intending to be legally bound hereby, have duly executed, sealed and delivered this Franchise Agreement in triplicate the day and year first above-written.

POPEYES Famous Fried Chicken Corporation
BY: /s/ *ALVIN C. COPELAND,* President
/s/ *WILLIAM F. GREGORY,* Franchisee
/s/ *MICHAEL C. SULLIVAN,* Franchisee

THIS ENTIRE AGREEMENT INCLUDING CORRECTIONS, CHANGES AND ALL ATTACHMENTS AND ADDENDUMS, SHALL ONLY BE BINDING UPON POPEYES FAMOUS FRIED CHICKEN, INC. WHEN SIGNED OR INITIALED BY ITS PRESIDENT.

APPENDIX D

JOINT TRIAL EXHIBIT 184

Reference: Gregory/Sullivan March 15, 1987

The following is a breakdown by store for advertising and royalty and the weeks open.

Store No.	*Advertising*	*Interest*	*Weeks Open*
208 (Troy)	$101,518.30	$ 5,121.79	09/27/81 to 02/28/82 07/18/82 to 10/02/83 10/30/83 to 03/15/87
311 (Pontiac)	$ 82,376.06	$ 5,041.51	06/20/82 to 10/02/83 10/30/83 to 03/15/87
361 (W. Bloomfield)	$ 58,585.37	$ 3,396.57	06/27/82 to 10/02/83 10/30/83 to 03/15/87
377 (Mt. Clemens)	$ 56,200.53	$ 3,098.87	07/11/82 to 10/02/83 10/30/83 to 03/15/87
430 (Southfield)	$ 56,181.02	$ 3,445.09	02/06/83 to 07/03/83 07/17/83 to 10/02/83 10/16/83 to 03/15/87
486 (Utica)	$ 20,553.85	$ 2,220.14	12/04/83 to 11/10/85
TOTAL:	$375,415.13	$22,323.97	

Store No.	*Royalty*	*Interest*	*Weeks Open*
208	$139,139.22	$ 6,376.20	09/27/81 to 02/28/82 07/18/82 to 10/02/83 10/16/83 to 03/30/86
311	$102,687.77	$ 5,724.58	06/20/82 to 03/30/86
361	$ 75,263.70	$ 4,157.32	06/27/82 to 10/02/83 10/16/83 to 03/30/86
377	$ 74,149.40	$ 3,854.74	07/11/82 to 10/02/83 10/16/83 to 03/30/86
430	$ 70,850.32	$ 4,292.33	02/06/83 to 07/03/83 07/17/83 to 10/02/83 10/16/83 to 03/30/86
486	$ 33,936.00	$ 2,763.06	12/04/83 to 11/10/85
TOTAL:	$496,026.91	$27,168.23	

plus: Amount Due on Notes — $5,358.66
Amount Due on MDC charge — $ 127.89